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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2005

PHYLLIS A. FILOSO,

Petitioner, Pro Se

__v.__

PRINCE WILLIAM COUNTY SCHOOL BOARD

Respondent,

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

I. Whether the Fourth Circuit Court of Appeals failed to follow it's Sister Circuits rulings when it affirmed the District Courts granting of summary judgement using Tyndal vs National Education Association for employee attendance when it takes the attendance out of context, fails to address or consider all the facts, fails to address attendance as it relates to the interactive process or reassignment/transfer under the the American with Disabilities Act (ADA) and 504 Rehabilation Act.

II. Did the Fourth Circuit Court of Appeals err in it's use of Matvia v Bald Head Island Management Inc., a case not sufficiently similar for constructive discharge/retaliation, as it relates that a regular person would not have felt compelled to resign,in failing to address these acts in context as they apply to a persons disability would then allow reckless indifference by the employer with regard to the particular disability of the disabled employee.

PARTIES TO THE PROCEEDINGS

The only parties to the proceedings are those listed in the caption of the case.

Statutory Provisions Involved

Baert v Euclid Beverage, Ltd., 149 F.ed 62, 633-34 (7th Cir. 1998) 13n

Barnett v U.S. Air, Inc., F3d at 1116 (9th Cir. 2000) 13n

Butlemayer v Fort Community School, 100f.3d 1285 (7th Cir.1996) 12n,13,23

Cannice v Norwest Brake, Iowa N.Z. 189 f.3d at 727 (8th Cir. 1999) cert denied 12n

Cravens v Blue Cross& Shield of Kansas City, 214 F.3d 1011,1020(8th Cir.2000) 14

Despears v Milwaukee Court, 3F.3d 635, (7th Cir. 1995) 20

Fjellestad v Pizza Hut of America, Inc., 188F.3d at 953 (8th Cir.) 12n,13n

Hendricks-Robinson v Excel Corp., 154 f.3d 85, 689 (7th Cir. 1998) 19

Humphrey v Memorial Hospital No.998-15404 (9th Cir.2000) 12

Kimbro v Atlantic Richfield Co, (Third Cir.) 19

Matvia v Bald Head Island Management, Inc., 259 F.3d 261,271 (4th Cir. 2001) 24

Reimer v Illinois Dept. of Transportation, 148 F.3d 800
(7th Cir. 1998) 17

Skelenke v Medical Imaging of Colorado
(10th Cir.2001) 26

Smith v Midland Brake, Inc., 180 F3d 1173, 18n
(10th Cir. 1999)

Taylor v Principal Fiancial Group Inc., F.3d
155,165 (5th Cir. 1996) 12n,13n,18n

Taylor v Pheonixville School District 184 F.3d
at 317-18, (3rd Cir. 1999) 12n,13n,19n

Tyndall v National Education Centers of California Inc. 15
31 F/3d 209. 212-216 (4th Cir. 1994).

Willis v Conopo, 108 f.3d 282,285 (11th Cir 1997)

Statues and Rules

42 U.S.C.δ12111(a)
42 U.S.C.δ 12112(b)(5)(A)
42 U.S.C.δ12111(8)
42 U.S.C. δ12113(a)
29 C.F.R. δ1630 (o)(3)
29 C.F.R. δ1630.2(o)(3)
29 C.F.R.pt.1630, App. δ 1630.9 at 359
29 C.F.R. Pt. 130, App.δ130.9
American with Disabilities Act of 1990, δ101(8), 102(a),

Other Material

Senate Rep.
House of Representative. No. 101-485, pt. 2 at 65 (1990)
EEOC Enforcement Guideline

EEOC Complaince Manual (CCH,N0.915.002 (March 1, 1999)
EEOC Guidance: Reasonable Accommodation and Undue Hardship under The Americans With Disabilities Act,
EEOC Interpretative Guideline

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interactive process to find an effective accommodation. and willfully failed to make any requested accommodation for the 2001-2002 school year and whose failure to do so created the adverse employment action.

II. The Fourth Circuit using Matvia v Bald Head Island Management, Inc., a case that cites a regular person would not have felt complelled to resign errs on the issue that consideration must be given as it relates to a person with a disability whose disability is affected by the employers actions. The case is not sufficiently similar to warrant its use in Mrs. Filoso's case for retaliation/constructive discharge on a number of grounds. 25

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No.

IN THE
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PHYLLIS A. FILOSO,
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United States Court of Appeals
For the Fourth Circuit

Brief For The Petitioner

OPINIONS BELOW

In the opinion of the District Court of The United States For The Eastern District of Virginia, Alexandria Division, Judge Leonia Brinkerma ruled in favor of the defendant on July 3,2003. The Fourth Circuit of Appeals affirmed that decision on December 3, 2003.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered December 3, 2003. This Court's jurisdiction is based on 28 U.S.C. ξ 1254(1) (1994).

Statement Of The Case

A. Course of Proceedings and Disposition

The District Court ruled on the case July 3, 2003. The Appellate Court ruled on the case December, 3, 2003.

B. Statement of Facts

Mrs. Phyllis Filoso represented herself pro se with the Fourth Circuit Appellate Court. As such, the entire record was available for review by the court.

Mrs.Filoso was an employee of the Prince William County School Board (PWCS) for six consecutive years and also two years prior for a total of eight years. As such she was a tenured Earth Science teacher with rights of continuing contract. During the last two years of her employment, Mrs. Filoso developed a disability which required accommodation by her employer in order to allow her to do her job. PWCS was first notified of the need to accommodate Mrs. Filoso beginning in April 2000. Appendix C page 2 (App.C.2)

In September 2000 Mrs. Filoso asked to be moved to a room with a window due to breathing difficulties brought on by her employer's floor waxing. This request was granted and she was allowed to move to a room designated as math. Appellant Br. Page 26. Mrs. Filoso was allowed to teach in the math room for the entire school year and received the highest rated evaluation: effective while teaching in the math room. Mrs. Filoso was never approached by administration to leave the math room during the 2000-2001 school years. App.C13-14.

In late October 2000 Mrs. Filoso reported a gas smell and asked for immediate corrective action to be taken at that time as it was triggering illness with her disability. These continuing exposures exacerbated her disability. This prompted Mrs. Filoso to send Mr. Gill an e-mail asking that she be disconnected from the HVAC system. App.C 18.

Unbeknown to Mrs. Filoso upon receipt of the e-mail Mr. Gill contacted Personnel where upon she became the subject of discussion There was a statement made that the school system had already "bent over backwards" accommodating her. Mrs. Filoso never received any response from the administration regarding her e-mail. App.C.5

In the January/February timeframe additional requests were made in connection with bus exhaust entering the building. School practice at that time was to prop the outside doors open in the morning and for buses to keep their engines running while unloading the students. Mrs. Filoso asked if the doors could be kept closed instead of propped open, if buses could shut their engines off during the unloading, and if it were possible to move the buses loading/unloading area further from the building. Mrs. Filoso was told no to every single request. App.C 26.

In March 2001 because of continuing breathing difficulties in the building Mrs. Filoso requested a meeting with Principal Gill to discuss her room assignment for the following 2001-2002 school year. Mrs. Filoso stated the necessity of being allowed to remain in a room with windows that could open. At that meeting Mrs. Filoso was given verbal instructions to obtain supporting documentation from her treating physician for such a request. Documentation in the form of a letter was given to Principal Gill as provided by her physician, Dr. Smith that clearly indicated the need to be assigned a room with a window for the following year. PWCS did not engage in the interactive process by either granting or denying this request. Neither Mrs. Filoso nor Dr. Smith was ever contacted regarding this request.

An employer has an obligation to look at each request as a new accommodation request. An employer has a continuing duty to interact with an employee when a request is made. App.C.9.

By giving notice in March that Mrs. Filoso's disability had progressed to the point that a permanent change to a

room with a window was necessary for the following school year, she is giving notice of accommodation needed with the supporting documentation six months before it is required. Mrs. Filoso provided her employer adequate notice/ time to engage her in the interactive process, look to alternatives if accommodation is not possible at Forest Park.

The issue of financial undue hardship for the school to provide accommodations in that math room or any room at Forest Park was claimed for the first time post litigation. App.C.6-7. Principal Gill at Fact Finding Hearing in May 2002 over a year later stated he couldn't give a dollar amount for any accommodation requested. App.C 4.

During the month of April Mrs. Filoso e-mailed and reported almost daily illness to the administration due to sewer gas on the second floor where she is located and for corrective action taken immediately to correct the problem. These daily exposures caused several absences and her having to leave early extremely ill due to sewer gas exposures in her classroom area during the month of April 2001. There again was no reply by the administration.

As her health continued to declined Mrs. Filoso copied Principal Gill to insure that he was fully aware of the situation. Receiving no response to any e-mails Mrs. Filoso requested a meeting in her room with Mr. Gill, Mrs. Custard, her immediate assistant principal and the building engineer. Mrs. Filoso verbally told them again of her illness and their need to take corrective action. Mr. Gill's own handwritten notes indicate that at this meeting administration did not address the issue of the sewer gas, any corrective action being taken, or any alternatives for Mrs. Filoso to keep her from being exposed. She is told no to her request to be disconnected and she is also discouraged from opening the window. App.C. 5. Although Principal Gill acknowledges other teachers have open windows to kind of relief the sewer gas smell Mrs. Filoso is signaled out and discouraged from opening hers. App.C.19.

Failure on the part of her employer to file a First Accident Report caused Mrs. Filoso independently to file one on her own behalf which cited injury due to sewer gas. Principal Gill signed off on the accident report. App.C.19.

Failure on the part of PWCS to correct the sewer gas resulted in Mrs. Filoso filing a confidential complaint with Virginia Occupational Safety and Health (VOSHA). App.C.29

Mrs. Filoso had engaged in protected activity of asking for accommodations, reporting hazardous work conditions, illness from such work conditions, and seeking help of her Teacher Association (PWEA) all prior to Mr. Fitzgerald's April 26th letter. App.C.16, 29. Not just the formal notification complaint about a potential ADA violation cited by Judge Brikerma. District Court Transcript p.23. (Transcript 23)

Mr. Fitzgerald in a letter dated April 26, 2001 to Mrs. Filoso state her absences are unreasonable, that her accommodation request are incredulous, and for her not to make any further accommodation requests. He gives her a directive to seek medical attention to correct her illness so that she can work in a "standard" classroom. He also references the two letters from Dr. Smith, so Mr. Fitzgerald as Personnel Director and 504 Compliance Officer is aware when his letter is written Mrs. Filoso has an illness that requires accommodation. He also directs Mrs. Filoso to contact his office to discuss employment options. App.C.27-28.

A person filing a complaint with VOSHA or reporting hazardous work conditions to their employer is protected by law from retaliation by their employer. Upon receiving Mr. Fitzgerald's letter of reprimand for absences due to sewer gas Mrs. Filoso wrote a letter to VOSHA voicing her concern that she was being retaliated for reporting hazardous/toxic conditions. App. C.29.

In a letter dated May 2, 2001, Dr. Smith stated that sewer gas was causing such intolerable symptoms in Mrs. Filoso

that it was necessary for her to leave the work environment until the problem could be corrected. App.C.18.

Judge Brinkerma cited the April 26th letter as "plaintiff was on notice from April 26, 2001, that her absenteeism was unacceptable and had to be corrected..." District Court Transcript 22-23.

Judge Brinkerma's interpretations of the absences fails to relate or consider the absences as they related to toxic sewer gas exposure, Mrs. Filoso's disability or Dr. Smith's April or May 2, 2001 letter indicating the need for necessary accommodations. App.C19

Such omission did not account for rights given to Mrs. Filoso by law for time off from work under Virginia's Worker's Compensation, Family Medical Leave Act, and as a reasonable accommodation for her disability. App.C.19,21 The court did not address any of these entitlements in her statement.

PWCS did not claim that Mrs. Filoso missed more than 12 weeks of school during this time period.

Following the April 26th letter a meeting was requested by Mrs.Filoso and Alan Caudill, Prince William County Education Association (PWEA) as her representative to be held with Mr. Fitzgerald. Discussed during that meeting were her absences as they related to sewer gas in her school, her disability, the need for accommodation to include a window and her desire to remain an employee.App.C.28.

Mrs. Filoso was verbally told that he would have to do some checking to see if her illness was a disability and that he would get back to her. Mr. Fitzgerald then sent Mrs. Filoso a letter dated June 8, 2001 stating that she needed to provide a letter from her doctor stating the nature of her disability and any necessary accommodations in order for PWCS to consider her having a disability. Mrs. Filoso complied with their request with another letter from Dr. Smith dated June 28, 2001 that was in addition to the April one for the following year.App.C.8.

A vacancy existed that would have fulfilled these accommodation requests, an Earth Science position at Brentsville H.S. App.C.3.

Another meeting was requested by Mrs. Filoso in early July 2001 to discuss Dr. Smith's letter and accommodation options. Mr. Fitzgerald, Mr. Caudill, Renee Campbell, and Mrs. Filoso in early July 2001 attended the meeting. At that meeting Mr. Fitzgerald informed Mrs. Filoso that an air study had been completed on Forest Park and that he had been told that it was OK. Mrs. Filoso requested a copy of that report from Mr. Fitzgerald. PWCS never provided a copy to Mrs. Filoso. Fitzgerald was also looking at possible moving Mrs. Filoso, then Mr. Fitzgerald stated nobody had air testing done like Forest Park and that he'd get back to us. App.C.3.

Mr. Fitzgerald chose not to have any further discussion/meetings with Mrs. Filoso and instead exchanged a couple of letters with her treating physician, Dr. Smith. After the first letter Mrs. Filoso was never copied or informed of any additional correspondence regarding her or asking for any input from Mrs. Filoso. App.C. 12.

Hearing nothing from Mr. Fitzgerald Mrs. Filoso had Mr. Caudill inquire about her accommodation requests as it related to what school she was being assigned to. Mr. Caudill e-mailed Mr. Fitzgerald and asked if they needed to meet on this issue. Mr. Fitzgerald declined to meet and told Mr. Caudill that she would be reassigned back to Forest Park. App.C. p.3.

Again hearing nothing concerning the accommodation request about cleaners Mrs. Filoso a Mr. Caudill inquire in early August on her behalf about the cleaning of the school for the 2001-2002 school year . Mr. Caudill e-mailed Mr. Fitzgerald and asked about cleaners. Mr. Fitzgerald at that time asked if there was a list. Mrs. Filoso provided the name of a company that specialized in cleaners for schools for people with breathing problems such as Mrs. Filoso's.

Having received no information from Mr. Fitzgerald as to her room assignment at Forest Park, Mrs. Filoso visited the school to see her room and begin preparations for returning to work. While in the building Mrs. Filoso discovered that the school system was continuing to use the same floor wax that had made her ill the year prior. She was also verbally informed by the school secretary that is in charge of room keys that she was now assigned to and inside classroom that had no windows. In speaking with the building engineer, Neil Sherrill she also finds out that PWCS had not provided her with a separate air system for her new room assignment .App.C. 4. There is an e-mail from Mr. Gill to Mr. Fitzgerald stating these facts and that he states, "We didn't make any such promises." "Let the games begin." App. Br. This comment is in contradictions to Mr. Fitzgerald e-mail to Mr. Caudil in which he stated the accommodations will be made at Forest Park. App. C.15..

Mr. Caudill immediately contacted Mr. Fitzgerald on Mrs. Filoso's behalf and was assured the school system would meet the accommodations in her doctor's letter. Mrs. Filoso made one more trip to the school later that week and was still told by the secretary in charge of keys that her room assignment had not changed.

Mrs. Filoso informed Mr. Caudill that she would do the one teacher workday as required by her contract at home during the week of Aug. 20th 2001 so that the room assignment could be worked out with Mr. Fitzgerald prior to teachers arriving in the building and getting their rooms' set-up. Having no separate HVAC system a room with a window was critical to Mrs. Filoso being able to work at Forest Park.

Reporting to work on August 27, 2001, Mrs. Filoso was still assigned to an interior room with no window. The room now contained two air filters. Unknown to Mrs. Filoso at the time was the fact that these were not the correct type of filter to remove the gases that cause Mrs. Filoso to become ill. Mrs. Filoso attempted to attend a faculty meeting in a

part of the building in which no accommodations for her had been made. Mrs. Filoso notified Mr. Gill of illness and left to go to her assigned room as it contained her charcoal air filters. App. C.15,21.

A meeting was held with Principal Gill later that day in his office. Mrs. Filoso reiterated the need for a room with a window. Principal Gill said he had no knowledge of accommodations since the discussions had been held with the Personnel Director, Mr. Fitzgerald over the summer. Mr. Gill e-mails Fitzgerald about the meeting and Mrs. Filoso getting sick. He states she went to her classroom. "We'll see how long that lasts." App.C.32.

She continued to go to work that week on the in-service days prior to student arrival. Although Ms. Filoso was ill each day that week she managed to stay at school during the entire work day and fulfill her contractual duties the week of Aug. 27th, 2001. However, the following week with the addition of buses, student personal grooming products etc. and the schools continued use of floor waxing the week before, Mrs. Filoso began having such breathing difficulties that she had to leave school before completing the workday. App. C.21.

With the exception of 3 days Ms. Filoso continued to report to work each day expecting that she would be assigned to a room with a window as Mr. Fitzgerald had stated her accommodations would be made at Forest Park. App.C.21.

After several failed attempts to secure accommodations Mrs. Filoso on Sept. 7. 2001 informed Mr. Gill that she and PWEA were meeting with an attorney. App.C.32.Following the meeting with her attorney Mr. Gill was informed on Sept. 10th, that Mr. Caudill was making one more attempt with Mr. Fitzgerald to secure a room with a window for her. Appellant Br. In an e-mail from Mr. Fitzgerald's to Mr. Gill he states that PWEA will be calling him to make a plea for a window for Mrs. Filoso, that they are ready to pull the plug on her." App C.32.

PWCS answer came six weeks later on Oct.5 , 2001, six weeks later that he wouldn't allow a one week trial in a room with a window. App.C.32.

Mrs. Filoso brought in another letter from Dr. Smith dated Sept. 13, 2001 that indicated that the information provided him by Mr. Fitzgerald concerning room assignment, HVAC and cleaners was lacking, incomplete and ineffective. PWCS never responded to Dr. Smith's letter. App. C..32.

In order for an accommodation to be an accommodation it has to be effective.

Aug. 27, 2001 Principal Gill was clearly on notice by Mrs. Filoso that the room that he had assigned her to was not effective. App.C.32..

It was also pointed out that no requests were made for Mrs. Filoso according to Principal Gill for 2001-2002. employment "App.C.. 32.

Mr. Gill sent Mrs. Filoso concerning her absences on Sept. 18, 2001 in which he states, "If you have a bona fide illness requiring you to miss work, you must provide me with a signed physician's letter indicating the reason within three workdays of your absences," etc., etc. "If you have any unexcused absences in the rest of the school year whether from coming in late, leaving early, or not coming in at all, I will have no choice but to recommend the termination of your employment. App.C.11.

Principal Gill in an e-mail acknowledges that he gets the notes from Dr. Smith's and references one in particular and states there's a new look, it had ventilated area checked. App.C.32. Mr. Gill is also on record that he was aware of Sept. 13th letter when he wrote Sept. 18th letter. App.C.32.

Mrs. Filoso provided a doctor's note for every single time she had to leave the building early due to breathing difficulties from non-accommodation which was the only time she missed after the Sept.18th letter. Mrs. Filoso had complied with the instructions in the Sept. 18th letter. PWCS did not claim that Mrs. Filoso did not provide the return to

work notes as she was told to provide within the 3 days. App.C.32.

PWCS did not claim that Mrs. Filoso had not complied with the Sept. 18th letter. Mrs. Filoso is recommended for termination despite having complied with Principal Gill's

Mrs. Filoso was placed on Administrative Leave with pay until the Grievance Process was completed. App.C.33.

Mrs. Filoso pointed out to the court that at the time she was being placed on Administrative Leave there were two positions available within the school system for which she was qualified. App.C. 15.

In July 2002 Mrs. Filoso was officially terminated by the Prince William County School Board.

At the time of the final adverse action, termination Mrs. Filoso had two doctors, Dr. Smith and Dr. Grace Ziem an Occupation/Environmental physician both treating physicians had written letters on Mrs. Filoso's behalf stating that she had a disability that needed to be accommodated. The school system did not consult with any other doctor and instead as Mr. Fitzgerald stated at the Fact Finding Hearing obtained his information about Mrs. Filoso's illness from some unknown source off the Internet. App.C.8.

Summary of Argument

Discrimination under the ADA encompasses not only adverse actions motivated by prejudice and fear of disability but also includes failing to make reasonable accommodation of disabilities. The ADA specifies that an employer discriminates against a qualified individual with a disability when the employer does "not mak[e] reasonable accommodations to the known physical or mental limitations of the individual unless the [employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the [employer]" 42 U.S.C. δ12112(b)(5)(A).

This brief is based on three premises.

I. The review is necessary to ensure employees are entitled to equal protection under the Americans With Disabilities Act and the 504 Rehabilitation Act regardless of the circuit in which they reside. Specifically as it applies to the duty by an employer to engage in the interactive process, act in good faith and duty to reassign to a vacancy in which they are qualified for if accommodation is not possible at their current position is equally applied.

The Fourth Circuit Court of Appeals in affirming the decision of the District Court disregarded or failed to consider 29 C.F.R.&1630 (o)(3) and 42 U.S.C. &12111(9)(B) as they applied to Mrs. Filoso's case. They acted in a manner inconsistent with their sister courts and the U.S. Supreme Court when they granted summary judgement when there was a genuine dispute of material facts as to whether or not her employer engaged in "good faith" in the interactive process to find an effective aceommodation. The U.S. Supreme Court when it declined to disturb Humphrey v Memorial Hospital sent a very clear message to the various circuits as to their duty to engage in the interactive process and to reassign to a vacancy.

The majority of sister circuits including the third, fifth, seventh, eighth, ninth, and tenth have ruled on the issue and have held that an employer will be liable when a reasonable accommodation otherwise would have been possible had the employer engaged in the interactive process in good faith.[1]

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[1]. Barnett v U.S. Air, Inc.,228 F3d at 1116 (9th Circuit 2000); Smith v Midland Brake,Inc., 180 F3d 1173,(10th Circuit 1999);Cannice v Norwest Bank Iowa, N.Z. 189 F.3d at 727;(8th Cir. 1999), cert. Denied, 120 S.Ct. 1421 (2000); Taylor v Pheonixville School Distrist, 184 F.3d at 317-18; Bultemeyer v Fort Wayne Community School, 100F.3d at 1285 (7th Cir. 1996) 100f.3d at 1285 (3rd Circuit 1999); Taylor v Principal Fin. Group. Inc., 93 F.3d at 165 (5th Circuit); Fjellstad v Pizza Hut of America. Inc., 188 F.3d at 953(8th Circuit).

The third, fifth, seventh, eighth ninth, and tenth circuits also have to refused to grant an employer summary judgment if there is a genuine dispute of material fact as to whether or not an employer engaged in good faith in the interactive process.[2]

Both the Third and the Eighth Circuits, for example have explicitly established that a plaintiff has the burden of demonstrating that:

1) The employer knew about the employee's disability;
2) The employee requested accommodation or assistance for his or her disability;
3) The employer did not make a good faith effort to assist the employee in seeking accommodation; and
4) **The employee could have been reasonably accommodated but for the employer's lack of good faith."**

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[2] Barnett, 228 F.3d at 1116; Fjellestad, 188 F.3d at 953; Taylor, 184 F.3d at 318 (although no per se liability under the ADA, if an employer fails to engage in the interactive process at the summary judgment stage the employer's failure is prima facie evidence of bad faith and summary judgment will be denied; Taylor, 184 F.ed at 318 (where there is a genuine dispute about whether an employer acted in good faith in the interactive process, summary judgment cont. typically con will be precluded; Smith, 180 F.3d at 1173 (summary judgment would be premature if there is a genuine dispute regarding whether [the employer] participated in good faith in attempting to secure a reassignment position for [plaintiff]); Baert v Euclid Beverage, Ltd., 149 F.ed 62, 633-34 (7t[h] Circuit 1998) (summary judgment inappropriate when it was disputed as to which party had caused breakdown in interactive process; Bultemeyer, 100 F.3d at 1284-86 (denying summary judment to employer who refused to engage in interactive process, on the grounds that had if it done so a reasonable accomodation may have been found, even if employee did not request specific accommodation).

Taylor, 184 F.3d at 319-20 (emphasis added); Cravens v Blue Cross & Blue Shield of Kansas City, 214 F.3d 1011, 1020 (8th Circuit 2000).
This burden is also demonstrated in Willis v. Conopco, 108 F.3d 282, 285 (11th Circuit 1997) (per curiam).

II. The second premise is failure on the part of the Fourth Circuit to address these issues resulted in the court looking only at the end result of time missed from work and not the issues of failure to transfer to a vacancy that would have been an effective accommodation nor failure of PWCS to "act in good faith" in the interactive process. Both of these actions on the part of PWCS caused the result of time missed from work and termination.

The Fourth Circuit's ruling negates the intention of Congress when it envisioned that a "problem-solving approach should be used to identify possible accommodations...employers first will consult with and involve the individual with a disability in deciding on the appropriate accommodation." S.Rep.No.101-116, at 34 (1989);H.R. Rep. No. 101-485, pt. 2, at 65 (1990).

This Fourth Circuit's ruling also is contrary to applicable EEOC regulations which provide 'that in order [to] determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the qualified individual with a disability in need of accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodation that could overcome those limitations." 29 C.F.R. &1630.2(o)(3).

The EEOC's interpretive guidance informs that the "employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability". 29 C.F.R. Pt. 130, App. &130.9.

Finally the EEOC's Enforcement Guidance provides the "[t}he employer and the individual with a disability should engage in an informal process clarify what the individual needs and identify the appropriate reasonable accommodation." EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, EEOC Compliance Manual (CCH, No. 915.002 (March 1, 1999)

III. The third premise is when the Fourth Circuit choose Tyndal v National Education Centers, of California Inc. and Matvia v Bald Head Island Management, Inc., 259 F3d261, (Fourth Circuit 2001) No. 00-1650 to cite in Mrs. Filoso's case as the cases are not sufficiently similar and will have determinate effects on individuals with disabilities requesting accommodations and suffering adverse health effects of their disability when reasonable accommodations are not made.

Argument

1. The court erred when it used Tyndal vs National Education Association as the case cited to affirm the District Courts ruling to state that Mrs. Filoso had not made a prima facie case of discrimination by PWCS, her employer. The case is not sufficiently similar to apply the adverse ruling by the Fourth Circuit Appeals Court.

A. In the Tyndal case where the employee was not coming to work and leave requests were not work related to her disability as they applied to her job. Tyndal's absences had nothing to do with accommodation issues once at work.

This was not the case with Mrs. Filoso to work all but 3 days during the Aug.-Oct. 2001 time period in question. Mrs. Filoso although ill the week of Aug. 27, 2001 from non-accommodation in her work place did not miss any time from work.

Mrs. Filoso reported to work each day ready and able to do her job. It was failure of PWCS to provide the necessary accommodations she had been assured she would have that lead to time missed from the work day

Mrs. Filoso unlike Tyndall came to work.

Title 42 U.S.C., 12113(a) states, "A disabled employee may be held to any performance criteria that are related and consistent with business necessity, so long as the disabled employee is given the opportunity to meet such performance criteria by reasonable accommodation. Principal Gill is on record that he did not do any of Mrs. Filoso's requests for 2001-2002.

Despite PWCS own documents showing that Mrs. Filoso came to work all but three days and the time she left each day PWCS has repeatedly misstated the facts to the court regarding Mrs. Filoso's missed time from work. PWCS made the statement to the courts in stating that Mrs. Filoso did not come work but seven days. PWCS continued to make this assertion to the Appellate Court that Mrs. Filoso wasn't coming to work altogether. Mrs. Filoso presented herself for-work each day prepared to work.

The District Court also stated Mrs. Filoso wasn't coming to work. Transcript p.21. This was in err as PWCS own documents proved. App.C. 30.

A dispute exists as to the number of days Mrs. Filoso reported to work.

PWCS post litigation also stated that Mrs. Filoso's absences occurred around holidays and weekends post this is not a factual statement. Despite proof in e-mails directly relating illness from the sewer gas and pleading for corrective action to be taken, PWCS's own air quality report indicating the sewer gas in her work area, PWCS continued to make this statement. The record also shows that when toxic/hazardous substances are kept out of Mrs. Filoso's work environment and reasonable accommodated there was no attendance issue.App.C.22.

During Tyndall's tenure it is clear from the record that her employer worked with her to make every effort to accommodate and granted her accommodations for her disability. Id. 31 F.3d 209,*211. This issue is clearly in dispute in Mrs. Filoso's case.

The Tyndal also court ruled that despite her employer's efforts to accommodate her disabling condition, we hold that she was not a "qualified individual with a disability" protected by the ADA. Tyndall, 31 F.3d 209,*211.

Unlike Tyndal, Mrs. Filoso's employers when aware of her disability and requests from herself, Dr. Smith and PWEA representative Mr. Caudil disregarded their requests and instead of relying on information from any medical source relied on information that Personnel Director, Mr. Fitzgerald had obtained from an unknown source off the **Internet.** A fact not shared with anyone until a Fact Finding Hearing occurred in May 2002.

The Seventh Circuit has addressed this issue and stated that under 29 C.F.R 35.130 ..."public entities are required to ensure that their actions are based on facts, applicable to individuals and not on presumptions as to what a class of individuals with disabilities can or cannot do. " Reimer v Illinois Dept. of Transportation., 148 F.3d 800 (7th Cir. 1998). App.C.9.

There is a complete dispute of facts as to whether PWCS made any accommodations for Mrs. Filoso that would allow her to do her job in 2001-2002. Mrs. Filoso unlike Tyndall came to work.

Unlike the Tyndall case there is clearly a dispute of facts as to whether accommodations were made for Mrs. Filoso and there are significant discrepancies regarding attendance presented to the courts by PWCS.

2. The court erred when it didn't consider that PWCS did not assign Mrs. Filoso to a vacancy that she qualified for that would have provided effective accommodation.

The issue of a vacancy existing that would have allowed Tyndall to do her job was not an issue.

Mrs. Filoso had notified and provided supporting documentation six months prior to needing it for a room with a window for the 2001-2002 school year.

Mrs. Filoso has shown that there existed a vacancy at Brentsville H.S and PWCS does not deny that the vacancy existed at the time Mrs. Filoso made her accommodation requests for the 2001-2002 school year. This vacancy would have fulfilled the accommodation request of a room with a window, had an independent air supply, faced the back of the building away from the buses, had completed the renovations over a year ago to the building and being a science lab as a requirement after Mrs. Filoso was placed on administrative leave. The Court asked PWCS counsel if any of their schools had labs with open able windows and counsel replied she didn't know. Transcript 15. Counsel didn't know because Fitzgerald never considered transferring Mrs. Filoso to Brentsville. Mrs. Filoso's counsel was asked if she had asked for a transfer. Counsel responded not directly, however, counsel was in error as transfer was on the table as evidenced by Filoso's inquiry at their July 2001 meeting regarding her teaching/building assignment. The Third, Fifth, Ninth, and Tenth Circuits have ruled on the issue of assigning to a vacant position.[3]

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[3] In Smith v Midland Brakes, the Tenth Circuit stated, "In expressing a desire for reassignment, an employee need not use magic words. But, the employee must convey to the employer a desire to remain with the company despite his or her disability and limitations. Taylor v Principal Financial Group, Inc. 93 F.3d 155, 165 (5th Cir. 1996). The employee should provide enough information about his or her

Filoso wasn't even considered because it was also their belief she will experience excessive absences. App.D.11. This statement is indicative of the attitude of PWCS towards Mrs. Filoso's disability, their unwillingness to discuss options with her and their failure to investigate an effective accommodation. Filoso was qualified for the vacancy. It is well documented by the Prince William Health Department and VOSHA that PWCS had a working knowledge of the serious risk factors to the schools occupants as related to the poor indoor air quality.

The Ninth Circuit Court stated..."As long as a reasonable accommodation is available to the employer that could have plausibly enabled a handicapped employee to adequately perform his job, an employer is liable for failing to attempt the accommodation." Kimbro v Atlantic Richfield Co., 889F 2d 869

In addition "Failure to consider the possibility of reasonable accommodation for known disabilities if it leads to discharge for performance inadequacies resulting from the disability

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limitations and desires so as to suggest at least the possibility that reasonable accommodation may be found in a reassignment job cont. within the company. In expressing a desire for reassignment, an employee need not use magic words, but, the employee must convey to the employer a desire to remain with the company despite his or her disability and limitation. Taylor v. Phoenixville School District F.3d , No. 98-1273, 1999 WL 184138 at *12 (3rd Cir. 1999); Hendricks-Robinson v. Excel Corp., 154 F.3d 85, 694 (7th Cir. 1998) (A" request as straightforward as asking for continued employment is a sufficient request for accommodation."); EEOC Guidance, at 8 ("To request accommodation, an individual may use 'plain English' and need not mention the ADA or use the phrase 'reasonable accommodation'.")

amounts to discharge solely because of the disabilities." Despears V Milwaukee Court, 3 F.3d 635, (7th Circuit 1995). The Third Circuit has stated that transfer to a job that an employer knows an employee cannot do, even though that job may have the same pay and benefits can be consider to be an actionable adverse employment action. Dilenno v Goodwill Industries of Mid-Eastern Pennsylvania, (Third Circuit). The Fourth Circuit has a similar ruling in Boone v. Goldin(Fourth Cir. 1999).

Transfer of Mrs. Filoso from Forest Park H. S. was also later shown to be a complete necessity. Principal Gill had information that he never shared with Mrs. Filoso, Dr. Smith or Mr. Caudill. Principal Gill stated at the Fact Finding Hearing that he had considerable experience with sewer gas issues at Hylton H.S.during the nine years he was there. Hylton also a Prince William County school has the same design as Forest Park and also experiences sewer gas.

3. PWCS failed to "act in good faith" in the interactive process to find an effective accommodation, and willfully failed to make any requested accommodation for the 2001-2002 school year and whose failure to do so caused the adverse employment action.

Prince William County Schools, (PWCS) would have the courts rule that an employer may ask for documentation for a disability and necessary accommodations and then totally ignore the interactive process with the employee to find an effective accommodation. This is allowed only when the solution is obvious and effective.

First and foremost in any discussion of accommodation for Forest Park H.S. it must be remembered that because Mrs. Filoso was not transferred to the vacancy at Brentsville H.S.

Title 29C.F.R &1630 (0)(3) states that it "may be necessary" for the employer to engage in the interactive process. The EEOC's interpretive guidelines state that once an employee requests accommodation, the employer "must make a reasonable effort to determine the appropriate

accommodation." 29 C.F.R. pt. 1630, App. & 1630.9 at 359. The guideline continues that in some instances when it is clear what accommodations will work it is not needed.

This was never the case with Mrs. Filoso. Her accommodations are not obvious and require discussions with her. This did not happen.

Mrs. Filoso was told in Mr. Fitzgerald's April 26, 2001 letter not to make any additional requests and that her requests were incredulous.

Finding a workable accommodation for Mrs. Filoso required effort on the part of PWCS to obtain information about various buildings, their air systems, cleaners and consulting with Mrs. Filoso. None of these happened.

Mr. Gill stated he did not do any of Mrs. Filoso's requests for the 2001-2002 year. This is also evidenced by Mrs. Filoso, Mr. Caudill, and Dr. Smith continuing after the school year had begun to make the same accommodation requests that had begun in March 2001 the year before. It is also in Mr. Fitzgerald's testimony at the Fact Finding Hearing that he knew Mrs. Filoso was being assigned to a room with no windows.

Mrs. Filoso was assigned without any input from herself back to teach at Forest Park. The comment made with that assignment was that the school had been declared safe, it was not. She was also assured that the accommodations in her doctor's letters would be done. These were not done.

With no discussion with Mrs. Filoso the accommodation of being allowed to teaching the year before in a room with a window at Forest Park to allow additional ventilation was taken away for the 2001-2002 school year. Mrs. Filoso was instead placed in a "standard" work environment as Mr. Fitzgerald had demanded that she teach in his April 2001 letter.

The school system had sent Dr. Smith a letter in which they carefully crafted the wording of the information so Dr. Smith was completely unaware that they were talking about the same room under the same conditions that Mrs. Filoso had

asked to be removed from the year prior. Based on the information the school system provided, he stated in a letter that the accommodations" appeared reasonable". When Mrs. Filoso found out in August 2001 that the school system had not done the accommodation that Mr. Fitzgerald stated they would, she immediately contacted her PWEA, Alan Caudill. Upon learning that they had also given Dr. Smith false and misleading information she had him write another letter on her behalf asking for the accommodations once again. Dr. Smith in his testimony at the Fact Finding Hearing directly stated that he hadn't been given complete and accurate information when he made the statement "appear reasonable."

Upon returning to work Mrs. Filoso began experiencing breathing difficulties on the first day. She notified Principal Gill that the room was not working. Principal Gill had clear notice that the room that he had chosen to assign Mrs. Filoso to was not effective. An accommodation is only an accommodation if it is effective.

The EEOC Enforcement Guidance notes that "an employer must consider each request for reasonable accommodation," and that "[I]f a reasonable accommodation turns out to be ineffective and the employee with a disability remains unable to perform an essential function, the employer must consider whether there would be an alternative reasonable accommodation that would not pose an undue hardship." EEOC Enforcement Guidance on Reasonable Accommodation, at 7625.

The employer's obligation to engage in the interactive process extends beyond the first attempt at accommodation and continues when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is needed. This rule fosters the framework of cooperative problem-solving contemplated by the ADA, by encouraging employers to seek to find accommodations that really work, and by avoiding the creation of a perverse incentive for

employees to request the most drastic and burdensome accommodation possible out of fear that lesser accommodation might be ineffective.

By failing to "act in good faith" in the interactive process, particularly in the Aug.-Oct. 2001 time frame an "act of harm" was committed against Mrs. Filoso by Principal Gill and Mr. Fitzgerald. Both intentionally disregarded the fact that placement of Mrs. Filoso in a room without a window was causing her harm.

PWCS delay in officially responding to Mrs. Filoso's request to a room with a window came six weeks after school had begun. This delay caused exacerbation of Mrs. Filoso's disability on a daily basis. Mrs. Filoso is reporting to her administration she must leave due to her illness. Failure to take the appropriate measure to insure Mrs. Filoso's safety shows deference to Mrs. Filoso's health, the ADA requirement of the interactive process or of a timely resolution to the issue. Such delays by PWCS only served to intensify Mrs. Filoso's disability.

In Bultemeyer 100 F 3d (Seventh Circuit) 1285 The court stated " The interactive process would have little meaning if it was interpreted to allow an employer, in the face of a request for accommodation simply to sit back passively, offer nothing and then, in post litigation try to knock down every specific accommodation as to burdensome."

The interactive process is crucial in finding effective accommodations to allow an employee to do their job. Mrs. Filoso provided all documentation that her employer asked for, she asked for accommodations prior to any adverse employment actions, she notified her (teacher association representative to help intercede on her behalf) again prior to any adverse actions, she notified her building principal, Mr. Gill and assistant principal, Carolyn Custard prior to any adverse actions that accommodations were not be done during the 2001-2002 school year. Mr. Caudill on her behalf also notified Personnel Director and 504 compliance officer,

Rick Fitzgerald of the need to accommodate Mrs. Filoso and continued to ask on her behalf for those accommodations.

A later response came from Mr. Gill in connection with the Grievance process that the school system now claimed in Oct 2001 that Mrs. Filoso did not have a disability for the first time. A statement never made to Mrs. Filoso, Dr. Smith or Mr. Caudill. It was also made in response to Mrs. Filoso filing grievances for non- accommodation... Principal Gill also stated that he did no requests of accommodations for the 2001-2002 school year.

Mrs. Filoso's assigned classroom for the 2001-2002 school year was identical to every other earth science room at Forest Park. It was the "standard" classroom that Fitzgerald had demanded she seek medical attention to be able to teach in. It had the same HVAC system, no windows, same cleaners used. Although she was allowed to use her charcoal air filter other teachers without disabilities had fans in their rooms. The school system didn't even attempt to find an alternative wax or change their cleaning schedule so that the waxing was completed be teachers reported to work. Waxing continued the first week Mrs. Filoso was back in the building. She was expected to attend meetings in rooms that didn't even have an air filter.

Despite evidence to the contrary concerning reasonable accommodations Judge Brinkerma stated, in this case, I think the school system made reasonable accommodations and that with those accommodations; she was unable to perform the essential functions of the job because she simply wasn't coming to work. Transcript p.21. The issue of coming to work has already been shown not to have been presented to the court accurately as she did report to work. In Tyndall the court stated she "failed to establish that her discharge was motivated by bias against disabled employees or desire to avoid making reasonable accommodation. Mrs. Filoso has shown both existed.

1. The Fourth Circuit using Matvia v Bald Head Island,

person would not have felt compelled to resign errs on the issue that consideration must be given as it relates to a person with a disability whose disability is affected by the employers actions. The case is also not sufficiently similar to warrant its use in Mrs. Filoso's case for retaliation/constructive discharge on a number of grounds.

A. The **Matvia** case was decided on the issue of whether the employer had an affirmative defense to Title VII liability. The employer in that case suspended the supervisor without pay for four days and when behavior continued was terminated. **Matvia** 259 F.3d 261.

PWCS could not claim this defense. While Filoso was" acting in good faith" providing the documents requested of her, notifying her employer of obstacles to her doing her job prior to adverse actions. PWCS is acting in "bad faith". As numerous e-mails indicate there was no action taken by anyone in regards to Mrs. Filoso reporting the non-accommodation in 2001-2002. Failure on the part of Principal Gill to even respond to the accommodation requests in a timely manner or merely to say no. Failure to correct derision remarks in e-mails about Mrs. Filoso's disability and requested accommodations by Principal Gill, Renee Campbell, Assistant in Personnel and Mr. Fitzgerald. Mr. Fitzgerald as 504 Compliance Officer was responsible for insuring that the Rehabilitation Act was complied with and instead engaged in the e-mail banter of "another nail in her coffin," "let the games begin," " must be magic in the air," "she likes the alliteration," "plea for a switch" "we know she is sick," "we'll see how long that lasts," "Bubble Boy".

These actions clearly demonstrate a complete disregard for Mrs. Filoso's rights under the ADA. The secret file on her is a violation of school board policy this documentation was for the sole purpose of termination of indicating scrutiny that no other employee had.

B. In Matvia the employee did not immediately report the behavior. Mrs. Filoso immediately reported the non-accommodation by Principal Gill to Mr. Caudill who spoke directly with Mr. Fitzgerald. Mrs. Filoso believing that a public school system knows the requirements of the ADA and Rehabilitation Act would follow the law. Instead of correcting the behavior causing Mrs. Filoso "an act of harm" they relished in it. Mr. Fitzgerald even admits his remarks were "an attempt at humor" in his testimony at the Fact Finding Hearing.

The Tenth Circuit held in Selenke v Medical Imaging of Colorado(Tenth Cir. 2001),. that where an accommodation is delayed an employer does not violate the ADA, as long as the employee receives some other accommodation or at least does not suffer adverse employment action". PWCS did not respond to the request for a window for seven months and then the answer is no. PWCS offered no alternatives and reprimands and terminates Filoso for time missed due to their non-accommodations

This complete failure on the part of PWCS to respond clearly shows that the employer deliberately made her working conditions so intolerable by demanding for her to continue to work in an environment they knew was ineffective and had not worked the prior year. This caused injury to her disability on a daily basis so that the expected outcome would be for her to quit.

Judge Brinkerma quoted Mr. Gill's Sept. 18th letter. "That the letter stated, "If you have a bona fide illness requiring you to miss work, you must provide me with a signed physician's letter indicating the reason within three workdays of your absences," etc., etc. "If you have any unexcused absences in the rest of the school year whether from coming in late, leaving early, or not coming in at all, I will have no choice but to recommend the termination of your employment. Transcript p.23. (Principal Gill stated in testimony at Fact Finding Hearing that he had no

reason not to believe that Mrs. Filoso was ill as Dr. Smith's return to work certificates stated.)

Judge Brinkerma then stated, "And then a few days later, the absence continued, and I feel therefore that there's absolutely no evidence in this record that would support the inference that the termination was taken out of retaliatory reasons." Transcript p.23.

What Judge Brinkerma failed to consider in her interpretation of retaliatory actions were the facts that:

1. Mrs. Filoso complied with the letter from Mr. Gill dated Sept. 18th. She provided the documentation for her leaving early as they stipulated, brought in the notes within 3 days. Despite this fact Gill still recommended her for termination.
2. Principal Gill's own statement that he didn't do any of Mrs. Filoso's requests for the 2001-2002 school year.
3. Principal Gill's claimed after recommended for termination and grievances filed that Mrs. Filoso had no disability.
4. They had deliberately placed Mrs. Filoso in a school with no windows in the science rooms.
5. Principal Gill's created a hostile environment with their e-mail banter of derision remarks regarding Mrs. Filoso's disability and illness from non-accommodation.
6. Waited with the knowledge that Mrs. Filoso disability gets progressively worse with repeat exposures. Causing her to leave early and don't respond to such knowledge. **(Particularly disturbing is that fact that sewer gas is in the building again prior to Mrs. Filoso being place on Administrative leave. Principal Gill knowing how sick Mrs. Filoso got from it the previous year fails to alert her that toxic gas is in the building so that Mrs. Filoso could act accordingly.)** Mrs. Filoso sent an e-mail asking if it is toxic sewer gas that she is smells and received no reply. It is no coincidence that Principal Gill two hours after the e-mail was sent reporting hazardous

conditions in her building for the second year Gill is telling her that he will not even consider a one week trial in a room with a window.

7. When the complaint is made the current assignment is ineffective, Mr. Fitzgerald made no contact or attempt to find an alternative or give guidance, despite being the 504 Compliance Officer the entire six weeks this is going on.
8. Principal Gill is verbally told by Mrs. Filoso on September 9th that she is meeting with PWEA and attorney over the situation.
9. Placed the wrong type of air filters in her room.
10. Carefully crafted their every statement to Mrs. Filoso, scrutinized and recorded her every comment in violation of their own policy.
11. Violated their own policy of requiring an employee to work in an environment hazardous to themselves or their students. Both Mr. Fitzgerald's April 26th letter and Principal Gill's September 18 th letter demanded just this for Mrs. Filoso's disability.
12. Both Mr. Fitzgerald and Mr. Gill made the statement that Mrs. Filoso had made a report to VOSHA. Mrs. Filoso's name is written across letter from VOSHA.
13. Mrs. Filoso is treated differently then other employees who report accident/injury/illness due to work. Other employees are allowed to go home; allowed days/weeks off from work and do not receive letters of reprimand for time missed. PWCS own OSHA logs
14. No First Accidents Reports are filed on Mrs. Filoso for 2001-2002.
15. Patiently counted the days and documented every word in a secret file, and waited until they could attempt to claim too many absences. .
16. Mrs. Filoso is treated differently then other employees who report accident/injury/illness due to work. Other employees are allowed to go home; allowed days/weeks

off from work and do not receive letters of reprimand for time missed. PWCS own OSHA logs.

17. No First Accidents Reports are filed on Mrs. Filoso for 2001-2002.
18. Mrs Filoso was involuntarily transferred from Brentsville H.S. in June 2000 because the principal stated that, "she couldn't be trusted not to get sick." This despite the renovations that were causing Mrs. Filoso to become ill would be completed. App.C.25.

The District Court erred when Judge Brinkerma stated there was no causal connection. Judge Brinkerma looked only at attendance and not of the protected actions and the reaction by PWCS to those actions. One must look at the totality of all the actions and not view in isolation an incident/fact.

A position became available in Jan. 2002 for an earth science teacher to teach an online class. Mrs. Filoso was still an employee on Administrative leave and she was never once informed about or asked if she would like to teach the course. Mrs. Filoso could have taught this class from home. PWCS had no intention what so ever of Filoso remaining an employee under any circumstance.

Mrs. Filoso's has shown that in can be reasonably inferred that she was deliberately assigned to a work environment were the predicted outcome would be time missed from work This deliberateness on the part of PWCS was because they viewed her as a liability, it was easier to find another teacher who didn't need accommodations to replace her with, they didn't want to have to make any changes to their "standard" classrooms as they have stated, they wanted someone who would not contact VOSHA and the EEOC, **they simply wanted someone who could tolerate the air quality issues in their building as they stated others could.**

CONCLUSION

For the foregoing reason, the decision of the Court of Appeals should be reversed, and this litigation should be sent to court for trial. Mrs. Filoso respectfully requests this court grant the Petition of Certiorari.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

PHYLLIS FILOSO Plaintiff,	)	
v	)	Civil Action No. 02-1385-A
PRINCE WILLIAM COUNTY SCHOOL BOARD	)	
Defendant,	)	

ORDER

For the reasons stated in open court, defendant's Motion for Summary Judgment is GRANTED, defendant's Motion in Limine to Exclude Expert Testimony is DENIED AS MOOT, and it is hereby

ORDERED that judgment be and is entered in favor of the defendant.

The Clerk is directed to enter judgment in defendant's favor pursuant to FED.R. Civ. P. 58 and to forward copies of this Order to counsel of record.

Entered this 3rd day of July, 2003.

Leonie M.Brinkema
United States District Judge

Alexandria, Virginia

APPENDIX B

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 03-1943

PHYLLIS FILOSO, Plaintiff-Appellant,

Versus

PRINCE WILLIAM COUNT SCHOOL BOARD
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Leonie M. Brinkema, District Judge. (CA-02-1385-A)

Submitted: November 19, 2003 Decided: December 3, 2003

Before WILKINSON and GREGORY, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Phyllis Filoso, Appellant Pro Se. Mary Ellen McGowan, SICILIANO, ELLIS, DYER& BOCCAROSSE, Fairfac, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Phyllis Filoso appeals from the district court's order granting summary judgment in favor of her former employer on her claims alleging discriminatory treatment in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. ξ 12101-12213 (2000). And Title VII of the Civil Rights Act of 1964, 42 U.S.Cξ 2000e (2000). We have reviewed the record and find that Filoso failed to establish a prima facie case of disability discrimination under the ADA, Tyndall v. Nati'l Educ. Cntrs., 31 F.3d 209, 212-16 (4th Cir. 1994) or retaliation under Title VII, see Matvia v. Bald Head Island , Mgmt., Inc., 259 F.3d 261, 271 (4th Cir. 2001). Accordingly, we affirm the award of summary judgment to the Defendant. We deny Filoso's motion for oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

We deny the Appellee's motion to strike Filoso's informal reply brief.

APPENDIX C

In The
United States Court of Appeals
For the Fourth Circuit

Record No. 03-1943

Phyllis Filoso **Appellant, (Pro Se)**

V

Prince William County School Board
Appellee

APPELLATE BRIEF

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Counsél for Appellee

Jurisdiction
Appeal of Summary Judgement in The United States District Court For the Eastern District Of Virginia, Alexandria Division entered July 3, 2003 by Judge Brinkerma.

Requests the United States Court of Appeals for the Fourth Circuit vacates and remands for jury trial this case.

Summary judgement is appropriate under CFR rule 56(c)if there is no genuine issue as to any material facts. Anderson v. Liberty Lobby, Inc., 477 US 242, 256, 106 SCt 2505, 2514, 91 Led2d (1986)

Ms. Filoso is the Appellant in this case and is proceeding pro se.
Ms. Filoso will refer to herself in the third party as Filoso Prince William County School Board, Appellee will be referred to as PWCS. Prince William Education Association will be PWEA and Alan Caudill one of their representatives will be Caudill. . Tom Gill, Principal at Forest Park will be referred to as Gill. Rick Fitzgerald, Director of Personnel and 504 Compliance Officer will be referred to as Fitzgerald.

The judge stated that the record in this case is voluminous. Tab 1 p.20. As such, Filoso believes that the court erroneously overlooked important documents that supports Filoso's claims that summary judgement was **inappropriate**. Only in a trial can all the evidence be properly presented. Filoso will also point out in the record that the court when faced with conflicting evidence took the side of the moving party

Issue #1 on Appeal.

1. Whether Filoso has presented evidence for a prima facie case for disability discrimination or regarded as an individual with a disability and discriminated against. Filoso asks the court to vacate summary judgement for appellee and remand for trial.

Supporting Facts and Argument:

1. Statement of Facts

Filoso has a breathing difficult when exposed to a wide variety of chemicals both at work and in her daily life. **Principal Mulgrew began regarding Filoso as having a disability as early as May 2000 and asked for guidance as it being a possible 504 issue. Tab 6**
Filoso was an employee of PWCS for eight years prior to her termination.
Filoso was employed as a science teacher by PWCS.
Filoso was primarily an Earth science teacher for the last six years.
Filoso engage in numerous requests for reasonable accommodations from her employer beginning in April 2000 and ending in October 2001 when she was place on Administrative Leave pending termination on July 25, 2002.
Complete statement of facts have already been entered in the lower court.

Filoso would ask due to the large volume of facts that she has cited them in her argument that apply.

I. In order to establish a prima facie case for discrimination one must apply the following 3 prong test: 1. An individual has a disability within the meaning of the ADA, 2. He is otherwise qualified to perform essential functions of the job with or without reasonable accommodation 3. He has

suffered an otherwise adverse employment decision as a result of discrimination.

1.Disability

The court on July 3 2003 that for purposes of this analysis that the plaintiff (Filoso) does have a disability that impairs a major life function, that is, breathing in this case. Tab 1 p.20.

2. A.Reasonable Accommodation

An employer must look at the employee at the time the accommodation request is made and not project what may or may not work it the future. Employee's accommodation is based on what employee is capable of doing with accommodations at that point in time when request is made. Meyers v Hose (fourth circuit),
Roberts v. Progressive Independence Inc., Nos. 98-6062, 98-6098 (Tenth Cir. July 13, 1999)

As an employer PWCS had **duty to provide Filoso and all it's employees with a safe and healthy work environment,** Virginia Code. There is ample evidence from the Prince William County Health Department and Virginia Department of Labor and Industry that this was **not the case at either Brentsville H.S.** Tab 2. Gill **admitted** that **sewer gas was a chronic issue at Forest Park** and that PWCS agreed to do the preventative maintenance steps in their response to VOSHA in June 2001. Tab 3 **Sewer gas is toxic**. Tab 4 Forest Park continued to have sewer gas the following year indicating that the required maintenance wasn't being done. Tab 34

The Court specifically asked if there were any **windows** at any of defendants other high schools. Tab 1 p.15. PWCS Counsel could not answer because Fitzgerald, personnel director never considered such.

Counsel for Filoso was in **error** when she stated that Filoso hadn't directly asked. Tab 1 p.20. Filoso had indicated her willingness to transfer and specifically mentioned Brentsville and it's windows at the May 2001 meeting with Fitzgerald. This meeting was held in response to Fitzgerld's April 26th letter in which he stated among other things to discuss **employment options**.Tab 10 Filoso also testified at Fact Finding Hearing "He again asked me if I still planned on working for PWCS."At July meeting **they were looking at possibly moving me**, then he stated that nobody has had air quality test like Forest Park. Mr. Caudill and myself asked for a copy of report. **He said he didn't have it**. "He said **he was told it was ok** and wanted more specifics from my doctor." Tab 7 p. 239 **This is also evident in the e-mail where Filoso is asking what school she was going to be assigned to. Tab 9 p.239.**

Gill and Fitzgerald had full knowledge of **Filoso's request** for a room with a **window in March** 2001 and **again** on April 25, 2001. Tab 10 Prince William Education Association Representative for Filoso (Caudill) **asked** Fitzgerald if they needed to meet on this issue. Tab 9. The response from Fitzgerald was, there are other positions but **she would be assigned to Forest Park**. Tab 9

Defendant had an Earth Science vacancy for the 2001-2002 school year at Brentsville H.S. EEOC appendix 88 Hendricks-Robinson. This position would have **satisfied** Filoso's and her Dr. request of a room with a window and separate Heating/Ventilation/Air Conditioning (HVAC). Fitzgerald as Director of Personnel had full knowledge of opening and **vetoed it** and instead assigned Filoso back to Forest Park. Tab 9
Brentsville did not have a history or likely hood of sewer gas problems, bus exhaust entering the building, the earth science room,(room faced the back of the building away

from bus area and renovation work had been completed a year **prior**.

Gill and Fitzgerald with full knowledge of Filoso's need for a room with a window/separate HVACA system chose to retain Filoso at Forest Park H.S. Tab 9 When defendant informed Filoso of this decision there was no mention that her or her doctors accommodation request would not be honored.Tab 12. In fact Fitzgerald specifically state they will comply with doctor's accommodations. Tab 12 There was **no mention of any undue hardship or her requests being overly burdensome.** 28CFR 35.150(a)(3) **all documents produced have only been done so post hoc. Not produced for Filoso's Fact Finding Hearing either. In fact at Filoso' Fact Finding Hearing Gill directly states that he doesn't know the costs. Tab 14 p.258. At Filoso's hearing she specifically states that according to building engineer it's a simple process to disconnect. Tab 13. EEOC question #24 requires policy modifications, EEOC Reasonable Accommodation Guidelines here after referred to as (EEOC) (112) EEOC ques.45, EEOC Undue Hardship (112) Generalized conclusions will not suffice to support a claim of undue hardship. Assessment factors were never used by PWCS.** Gill **never** gave Filoso a reason for **rejecting** her requests for separate HVAC, different cleaning products before rejecting it. This **prevented any discussion** or alternatives accommodation being found. Skerski v Time Warner (3rd Circuit Appeal).

By Fitzgerald choosing to assign Filoso back to Forest Park PWCS then had **duty** to provide the necessary accommodations that would have allowed Filoso to do her job at that school. PWCS did not do this. **Gill states that he didn't do any requests for the 2001-2002 school year**. Tab 15 p.268. Gill provided completely **ineffective** room assignment with none of the requested accommodations

other than Filoso being allowed to use her own personal charcoal air filter.

Gill's assignment of Filoso to inside room with no window/separate HVAC system **was never an effective alternative and Gill knew that as it that room had never worked the year before**. No **modifications to HVAC** had been done. No window installed in that room. **No change in cleaning products** particularly the wax. Gill is on record that he checked with custodial staff and response was "approved wax through plant operations.Tab 16 p. **228. It is completely unreasonable for Gill to even contemplate that such a room would be an effective accommodation. Fitzgerald and Gill set Filoso up to fail.**

Humphrey v Memorial Hospitals Association No. 998-15404, (9th cir. 2001). Borkowski v. Valley Central School District, 63 f.3d 131, 143 (2nd cir. 1995). Barnett V U.S. Air, 228 F.3d 1105, 1114 (9th Cir.2000). " Id. At 1115

Gill and Fitzgerald have made several statements that Filoso **had a room with a window and that didn't work. It did work until April of 2001.** In April Filoso reports the room isn't working because of sewer gas coming in through the HVAC it then falls on PWCS to correct the situation **that Filoso had first reported previously months ago. Tab 54.** Filoso asks for Gill and AP,Custard to come to her room to discuss odor issue. Gill's own document indicates he's still not telling her it's sewer gas or acknowledging the problem. He goes out of his way to state that at 7:30 a.m. he doesn't smell it at (that exact moment). Filoso tells him according to paramedics it's not good to be breathing. Tab 17. Filoso offers **suggestions** for accommodations and **Gill states that he didn't do it because of the cost involve post hoc and at the time the request is made simply says NO**. Tab 17.

Feliberty v Kemper Corp, Roberts v Progressive Independence, The EEOC Enforcement Guidance, GET ###

Filoso and her doctor had asked in March/April 2001 for a room with a window for the following year. Tab 18(protective order (p.o.)

It is the Gill that chose **not** to make the accommodations **that would have allowed** Filoso to work a full day at Forest Park for the 2001-2002 school year after they decided to reassign her back to Forest Park.

Filoso showed up each day prepared to teach and fulfill her duties and when unable to remain a full day due to nonaccommodation. Filoso provided lesson plans for the substitute. Filoso did this while continuing to ask for the accommodations she was told she would have when Fitzgerald placed her back at Forest Park.Tab12.

Had defendant been **honest and up front** with Filoso about what accommodations they were going to make **or in this case not make** when Filoso asked for the window in March/April we would not be in court today. **Filoso could have been reasonably accommodated at another school**. Brentsville H.S. had an opening that would have fit Filoso's requests.

42 U.S.C. & Section 1211(9) **of the ADA requires an employer to reassign a disabled employee to a vacant position for which the employee is otherwise qualified.** Gile v United Airlines, 95 F.3d at 498-99.Hendricks-Robinson, 154 F.3d 694-95; Dalton v. Subaru-Isuzu Automotive, Inc., 141 F.3d 667, 678 (7th Cir. 1998); DePaoli v. Abbott Laboratories, 140 F.3d 668, 675 (7th cir. 1998)

Even in Smith v Midland Brake, Inc. No. 96-3018 (Tenth Circuit 1999), (court stated reassignment only if employee could have been accommodated in current position but

would experience undue hardship in doing so). Gill specifically states he turned down request because of cost after the fact. Tab 14. **Not because she couldn't be accommodated.**

Legislative history further supports this reading of the ADA. H.R. Rep. No. 101-485(II), at 63 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 345

EEOC Interpretive Guidance, 29 C.F.R. Pt. 1630,

If Gill is to be believed that he informed Filoso in April 2001 that she would not be allowed a room with a window for the following school year, **then as principal he had the obligation to inform personnel of that decision so that other options could be explored.** Filoso had complied with his request of a letter from her doctor stating the necessity of a window for her. Tab 18. Filoso's statement is that she **was not given an official answer until Oct. 2001.** Tab 19 then defendant is still under obligation for **either not trying to find alternatives or delaying** the interactive process.

Here the record becomes very contradictory. Gill states he informed Filoso in April 2001 in his deposition. Tab 20. **Filoso states she was not told this, did not learn she was assigned to a room without a window until the end of Aug. 2001 when she reports to school**. Tab 21.

Gill's statement is incorrect, as the record will show. Record shows Filoso has a meeting with Gill in March. Filoso states that she was told at the March meeting with Gill that he would have to check with science supervisor **and get back to her and for her to bring in a letter from her doctor** Tab 22 p. 209-210. Filoso brings letter from doctor about the window on April 25th. Tab 23.(p.o.) The next meeting is at her request in her room about sewer gas odors. Tab 17. Next communication is May 7th asking about odors so she can return to work. Tab 24 Filoso was out on leave after May 2nd. Gill had no further conversation or letters with Filoso about anything until Aug. 2001 when school is about to start.

Tab 67. Filoso dealings where only with Fitzgerald in May and early July. Inference from documents proves that Filoso's version is accurate as she states on April 25th in memo "here's the letter from my doctor."Tab 17 Gill is also on record that he NEVER wrote to Filoso's doctor or Filoso about expense or difficulty. **Tab 14 p.258**. Either scenario caused Filoso **not** to be assigned to a more suitable position.

In either case Filoso has **fulfilled** her duty of asking for the accommodation. Filoso went further and had a meeting with Fitzgerald per his April 26th letter on May 10th to discuss disability and reason of sewer gas for absences. Fitzgerald responds by stating that he'd have to do some checking to see if she had a disability.. Fitzgerald writes Filoso the June 8th letter in response to their meeting where it's stated she has a disability. Tab 26. Filoso complies with a letter from her doctor on June 28th. Tab 27. Filoso meets one more time with Fitzgerald in early July and then hears nothing in response. Tab 7 p. 239. Filoso had supplied the necessary information. It was then incumbent on the **defendant to engage in an interactive process to determine an effective location and room assignment.** This was not done.

Fitzgerald stated that he obtained **information about Filoso's illness from the Internet** not from any medical person.Tab 28 p. 129. Fitzgerald in his actions concerning Filoso clearly indicate in his **July 2001 and August 2001 letter that he is not acting on information he obtained from Filoso or her doctor but on information he obtained from the internet**. T 28p.129
Also of note is that Fitzgerald did not obtain information from the Dept. of Justice, Dept. of Labor, Job Accommodation Network division of Dept. of Labor **(JAN)**, or Virginia Dept. of Education Compliance Division. All sources that as 504 Compliance Officer he would access to for accurate information and be required to do as 504

Compliance Officer. EEOC Enforcement Guidance ques.#5. 29C.F.R, pt 1630 app& 1630.9(1997)
Filoso in Oct. 2001 gives Gill packet from **JAN** on accommodations and employer responsibilites. Gill states he took a look but thought it was just something she got off the Internet. Tab 25 p.283.

Fitzgerald and Gill don't try to accommodate based on information about Filoso's disability how chemical exposures affected her breathing and body from either Filoso or her doctor but on some unknown source from the internet. Defendant's choice of words and actions following Fitzgerald's July letter clearly indicate they considered this a psychological condition. As he now states "It appears the source of Ms. Filoso's complaints remains undetermined." Tab 29.Both Gill and Fitzgerald had been told by Filoso and her doctor that sewer gas was causing her the problem in April and May 2001.Tab 11. Air sampling was done **after** the dates Filoso was complaining. **Since they now consider it not physical Fitzgerald and Gill decided they didn't have to accommodate Filoso for the 2001-2002 school year.** As evident by Gill not making any accommodations. **Gill states that he did not do Filoso's request for the 2001-2002 school year.** Tab 15p.268.

Riemer v. Illinois Dept. of Transp., 148 F.3d 800 (7th Cir. 1998). 28 CFR 35.130 "all provisions taken together...consistent with these standards, **public entities are required to ensure that their actions are based on facts, applicable to individuals and not on presumptions as to what a class of individuals with disabilities can or cannot do." "Further, school districts obligation to negotiate about reasonable accommodation of employee with bipolar disorder was triggered whether or not officials knew specific name of her condition. Taylor v Phoenixville School District, 184 F.3d (3rd Cir. 1999)**

The duty to accommodate is on going and doesn't stop with the first request.

Ralph v. Lucent Technologies, 135 F.3d 166(1st Cir. 1998) It was also employer's duty to communicate with Filoso about sewer gas issue so that reasonable accommodations could be made. This was not done. **Gill purposely hid the fact that it was sewer gas for seven months and never resolved the problem with adequate professionals.** This causing Filoso to **escalate** her accommodation requests. Tab 23

Had Gill simply corrected the sewer gas issue back in Oct. 2000 by **adequately addressing the problems Filoso would not have had to ask for a separate HVAC system for her room at Forest Park.**

EEOC Enforcement Guidance on Reasonable Accommodation, at 7625.

At the time Filoso was put on administrative leave neither Fitzgerald or Gill **discussed any alternative positions or employment opportunities despite Filoso asking for accommodations to allow her to do her job.** Filoso could have been a home bound teacher.

Fitzgerald as personnel director would also know at the time that Filoso was being placed on administrative leave that the virtual school which had an earth science position was also coming available in three months that would be taught via the internet. Earth science taught via the **Internet** does not include any labs in any type of laboratory setting or school setting.

Mengine V Marvin Runyon, Post Master General, U.S. Postal Service, No. 96-3287, (Third Circuit Appeals 1997 Shirling, 90F.3d at 832,

Humphrey v Memorial Hospital No. 98-15404, (Ninth Circuit 2001) Supreme court declined to disturb and let stand an employers duty to reassign and the interactive process. The vacancy at Brentsville that defendant had knowledge of was a plausible assignment for Filoso.

In Giles v United Airlines At 1114-1115 (9th Circuit) the court stated "The **interactive process requires communication and good-faith exploration of possible accommodations between employers and individual employees, and neither side can delay or obstruct the process**. Beck v University of Wis. Bd. Of Regents, 75 F.3d 1130,1135 (7th Cir. 1996) A party that obstructs or delays the interactive process is not acting in good faith. **A party that fails to communicate by way of initiation or response, may also be acting in bad faith. Employers, who fail to engage in the interactive process in good faith,** face liability for the remedies *1138 imposed by the statue if a **reasonable accommodation would have been possible.** Barnett, 228 F.3d at 1116. Moreover, we have held that the duty to accommodate "is a **'continuing' duty** that is 'not exhausted by one effort." McAlidin, 192 F.3d

See also Templeton v Neodata Services, Inc., 162 F.3d 617, 619 (10th Cir. 1998).

Using PWCS document Tab 30 which objection has already been made to as it is a summary. It indicates that **there is no attendance problem for Filoso when she is reasonably accommodated by keeping hazardous,toxic, and chemical irritants out of her workplace that is already required by law.** Filoso is already on record that there are inaccuracies in document. Tab 31.

2. B. Interactive Process

To establish that an employer failed to participate in an interactive process, a disabled employee must show: (1) the employer knew about the employee's disability; (2) the employee requested accommodation or assistance for his or her disability: (3) the employer did not make a good faith effort to assist the employee in seeking accommodation; and (4) the employee could have been reasonably accommodated but for the employer's lack of good faith. Taylor, 184 F.3d at 319-320 (emphasis added); Fjellestad v Pizza Hut of America, 188 F.3d at 952. Cravens v. Blue Cross & Blue Shield of Kansas City, 214 F.3d at 319-320 (8th cir. 2000) Willis v. Conopco, 108 F.3d 282, 285 (11 Cir. 1997) (per Curiam)

In addressing each one:
1.The court ruled on July 3, 2003 for purposes of hearing that Filoso had a disability. Tab 1 p.20

2.It is well documented that Filoso made several requests for accommodations prior to the April 26th letter. **SEE ACCCOMMODATION SECTION** Issue I 2.A. EEOC guidelines include protection under the **Opposition Clause**. It includes requesting reasonable accommodation for a disability.

3. Gill's and Fitzgerald's only response to any requested accommodations after Sept. 2001 was No or no response at all. They made the decision to place Filoso back at Forest Park with **no input** from Filoso. They made the **derision to move** Filoso from a room with a window to an inside classroom with **without consulting** Filoso,PWEA, or her doctor. They made the decision to use the same floor wax that caused Filoso breathing problems the year before. **They never discussed any of these issues with Filoso.** Nor did they discuss options with Filoso about **transferring** even though Filoso had indicated to be accommodated she was willing to do so. Tab 25,9.

Neither Fitzgerald or Gill spoke or consulted with Filoso after the first week of July. The ADA and EEOC guidelines specifically state that an interactive process **must be with the employee**. **Filoso was kept out of the loop by the Fitzgerald and Gill**. Fitzgerald writes Filoso's doctor a couple of letters not to ask for more info on Filoso's condition but to tell him their medical opinion on Filoso from information from the internet. They also **ask the doctor to be an electrical engineer** and provide wiring specifications. Tab 29. Rather than referring that question to the appropriate personnel in their building maintenance and construction departments who would be knowledgeable about the building design and specifications.
Filoso who is in the best position to know the layout of the school, rooms that have windows, which cleaning products caused her respiratory problems is not consulted, not consulted about alternative room assignment since defendant chose not to make accommodations at Forest Park.

Gill is knowledgeable about sewer gas a likely problem for that building on an ongoing basis. Gill freely admits that sewer gas was an ongoing problem in other school building, Hylton with the same design as Forest Park on a regular basis. Tab 33 p. 191.
No one from PWCS **ever shared this information with Filoso**, her doctor, or PWEA. It was not forthcoming until Filoso's Fact Finding hearing. This information was **vital** to any discussion of Filoso remaining in that building and was not given. **Emphasis added** It is evident from the fact that once again in **Oct.5 2001 Filoso is notifying defendant of gas odor again. Tab 34. It is 3 hours after that notification that Gill officially turns down Filoso's request for a room with a window. Tab 19. Gill is aware that there will probably be a worker's comp. issue again. Emphasis added.**

The Court took the Gill's version of the following.

The Court when faced with competing evidence is suppose to rule with the nonmoving party. A **complete contradiction** was made concerning Kathy Lanzafama. She is quoted in the summary judgement court record. Tab 1 Page15. Filoso stated in her affidavit that she spoke to science supervisor, Kathy Lanzafama in Oct. of 2001 prior to a grievance hearing and Gill at that time had never spoken to Lanzafama. Tab 35. Filoso is told "**you can do earth science any where and don't they know how hard it is to find good earth science teacher**? Tab 35. Inference can be made those documents and conversations are being manufactured post hoc once again and evidence of reasons changing also. **PWCS in an effort to manufacture information post hoc just committed discrimination. If** Gill and Fitzgerald are stating that they knew that Filoso has to be in a traditional science room per his "so called" conversation with Lanzafama. **Gill and Fitzgerald is also knowledgeable of Filoso's and her doctor's request in March and April 2001 for a room with a window. Using defendant's logic then Filoso can only be accommodated in a science room with a window. Gill and Fitzgerald with this knowledge deliberately placed Filoso in a science room without a window for the 2001-2002 school year. Tab 36. This when there was an opening at Brentsville that would have satisfied both requirements. Defendant didn't bother to explore viable positions that fit this requirement. A personnel was also aware that Filoso is a certified Middle School teacher. Filoso could have taught any subject in a middle school that had a window that would open also.**

The **Court erred** when it didn't view evidence in the light most favorable to the non-moving party(Filoso). The Court took the word of Gill that Filoso wasn't doing adequate labs and that Filoso's students suffered as a result. Filoso's own affidavit stated specifically that student were doing as many

or more labs than other earth science students. **Tab 38 p. 218. The court failed to examine all the evidence presented. Filoso's evaluation for 2000-2001 was done over a period of months and based on numerous observations in Filoso's classes.** It is also based on a teacher **effectively fulfilling** all aspects of their job description. If Filoso hadn't been doing labs it would have been reflected on her evaluation. It was not. **Also obvious that Filoso was doing an effective job is the fact that Gill NEVER once asked Filoso to move back into the science room.** If Gill had any concerns or reservations that Filoso's students weren't receiving proper instruction action would have been taken long before April as Filoso had been in that room for 8 months and school officials were **completely satisfied with Filoso's teaching**. Tab 40 p.252-253 **Filoso's students scored higher than school average for the mandatory Va. SOL tests. Tab 39.218-219.** Further proof that her students were not denied the benefits of proper earth science instruction. Tab 40.

Gill conveniently left out the fact that it was Filoso who was concerned about her students education and despite the fact that she is on leave without pay goes into school every couple of days in the morning prior to school beginning to meet with the substitute and drop off lesson plans, discuss issues, do grading, provide final exam, do report cards. Tab 45. All this while not receiving any pay or acknowledgement from Gill or PWCS. For Gill or Fitzgerald to try and portray Filoso's accommodation request as being only self-serving is absurd. It is they and PWCS who has knowingly exposed all occupants of the building including students and not tell them or their parents of the sewer gas. It is defendant who has jeopardized the learning environment with sewer gas.

The court was misled by Ms. McGowan. Tab 1 p.15There is evidence of exhaust entering second floor inside rooms that have no windows in them. Tab 41

4. In response to Filoso's March/April 2001 request to a room with a window that could open Filoso was officially told No in Oct. 2001. Tab 19. Had Gill been honest and up front with Filoso **about not** assigning her to a room with a window at Forest Park, Filoso could have been transferred back to Brentsville H.S. Brentsville which had a vacancy in earth science
for the 2001-2002 school year. Brentsville's science labs have windows that open, separate HVAC, no sewer gas issues, no bus exhaust issues. **Assigning Filoso to Brentsville would not have cost the defendant any money nor would it have violated any policy or cause undue hardship. EEOC Guidelines Ques. 27.**
Defendant at the time that Filoso was placed on administrative leave **did not offer any alternatives**. Filoso at that time could have been a homebound teacher or as defendant was aware the Virtual High School was coming on line in 3 months and would be taught via the Internet, not in a school building. Filoso could have done that job from home. Earth science was one of the subjects taught on line.

Defendant did not engage in the interactive process with Filoso. There was **no discussion**. Filoso was **led to believe** that defendant would **make the necessary accommodations** at Forest Park for her to teach there, then didn't. Fitzgerald **stated they would comply** with doctors requests and **didn't**. Tab 12. Then they made independent decisions without input from Filoso as to were she would be assigned and to what room while in the same breathe telling her she would be accommodated there. **In reality there was no accommodation made there for the 2001-2002 school year**. Tab 15.**Even the two filters Defendants attempt to hold up as being an accommodation were not the correct type of filters to use. Charcoal filters are the correct type not merely hepa filters.Tab 42 p.184 Had defendant communicated with Filoso she could have provided the**

proper make and model as she had purchased one for her use already. Despite PWCS having an environmental shop it is the Personnel director, Fitzgerald purchasing the filters. Another attempt to deceive Filoso.

It is obvious that Gill and Fitzgerald made no accommodation and was playing a waiting game. They figured Filoso would just have to quit or go on leave because she couldn't tolerate the air quality in her room. **Filoso didn't quit she didn't go out on leave and instead stood her ground and attempted to work each day asking for the accommodations they had promised her.**

Humphrey v Memorial Hospital . Taylor v Phoenixville School District, 184 F.3d 296, 316 (3d Cir. 1999) Barnett v. U.S. Air, Inc. 228 F.3d 1105 (9th circuit 2000) cert. Granted, 121 S.Ct. 1600 (2001) p. 1116-1117.

The Fourth Circuit in Haulbrook v. Michelin N. American(No-00-1546) stated "The ADA however, does not abrogate the general duty of an employee to respond to direct and reasonable requests of his employer for information and cooperation regarding potential disabling condition."...Haulbrook's complete refusal to cooperate with Michelin's good-faith efforts to determine the nature of his possibility disability and craft necessary accommodations was the cause of his termination."
Using the Fourth Circuit's logic in this case it has been shown that Filoso notified Gill **prior to any adverse actions** of issues that were making her ill and not allowing her to do her job. Defendant had not done the maintenance on the Filoso provides requested documents from her doctor in April 2000 and April 2001 that state the nature of her disability, accommodation requests, and the causes of Filoso's breathing problem, rash, headache etc. Tab 18, 43, 27. They **were directly correlated to her exposures**. There was no mystery as Defendant tried to claim in letter to

Filoso's doctor on July 10th. Tab 29 . Both Filoso and her doctor spelled out exactly **what changes in Filoso's work environment cause the problem**.i.e chemical exposures that did not belong in her work space. Tab 18,43. Filoso tried every avenue available to her to insure that her students got the best continuing education and to try and work with PWCS. **Filoso acted in good faith**.

It has been shown that PWCS either didn't respond, only response was No, misled, stalled ,documents have been manufactured post hoc, or flat out refusal to accommodate. Gill and Fitzgerald engaged in a shell game in which they try to pass it off as the letter wasn't addressed to me, it was addressed to Gill or Fitzgerald or vice versa. Or that it wasn't my decision it was his despite Fitzgerald having stated contact him. Tab 10. It is clear from the evidence that PWCS does not have a policy on the ADA. Fitzgerald stated that 80 different principals get to make independent decisions without input from his office as 504 Compliance Officer. And when Fitgerald's office does make comment it's in the form of derision remarks. It is also clear that PWCS does not have adequate policy concerning the ADA. Fitzgerald states they have over 7000 employees but does not have a ADA log or require information to be passed on to Personnel so that it can be maintained in some way to make sure compliance is met. It is also clear that Fitzgerald when faced with a somewhat unusual disability uses the Internet for information and not health professionals. It is also clear that there is not even a semblance of a time frame in which to respond to employees about requested accommodations. Defendant fails to communicate with the employee and engages in a game of semantics. Documentation in PWCS consists of scribbled notes that are placed in personnel files without the employees knowledge or opportunity to place their own letter in response. This despite it violating PWCS policy. Employees are given no guidance from ADA or

504 Compliance Officers as to the ACT and their responsibilities. There is no monitoring or follow-up to see if accommodations have been met or are working. There is no discussion of alternatives when requested accommodation is denied. The lack of policy, the complete bungling of requests information, the shell game, long time delays in responding or in this case just leaving Filoso dangling, and failure to interact with Filoso to get her input all show that defendant did not act in good faith. Tab 56 p. 112-114.

II. Absenteeism

Filoso 1999-2000 absences

Filoso had no attendance issue prior to PWCS containmenating her work environment with irritants and hazardous substances. This is evidenced by Filoso being an employee for six years prior to any attendance issue. Filoso began reporting **illness from exposures** occurring due to renovation work being conducted during school hours in April 2000 including an ER visit. It was only after Prince William County Health Department made significant recommendations due not only to Filoso's complaints but other as well that any attempts were made to reduce employee exposure. Even those recommendations were not implemented correctly as evidenced by Prince William County Health Department follow- up visits and additional correspondence. Tab 2 Filoso was entitled to **worker's compensation** due to the accident/injury from such exposures. **Defendant never filed a First Accident Report as required by Va. Code 40.1-51.1 letter B for either school.**

Filoso was transferred over her objections from Brentsville H.S. for the 2000-2001 school year. Renovation work was scheduled to be completed prior to teachers

returning to work in Aug. 2000. Defendant **NEVER** discussed options with Filoso. She was just **told** she was being transferred. **"That she couldn't be trusted not to get sick in the building."** Tab 44

Filoso 2000-2001 absences
Gill had knowledge beginning in Oct. 2000 of Filoso experiencing illness from the odors other than wax.

Filoso's **doctor removed** her in May 2001 from Forest Park until sewer gas could be corrected. Tab 43. Filoso **went by the school in May and June 2001 every other day to speak with** her sub and drop off lesson plans. During this time **Filoso made inquires** about sewer gas odors and **never received a response** to her inquires. Filoso continued to do lesson plans, tests, grades, etc. despite being on leave without pay at that time. Tab 45 Defendant never called or spoke to Filoso or her doctor about the sewer gas.
Gill **did not try to engage in communication** with Filoso about the sewer gas problem, steps they were taking to try and eliminate it, her possible return to teaching for the remainder of the year despite her coming to school on a regular basis and inquiring. Tab 45.
Gill had knowledge beginning in Aug. 2000 of the need for clean air supply (free of known irritants and toxic substances). Tab 46.

Defendant under CFR 35.133 is required to do maintenance on equipment necessary for a person with a disability to do their job. Emphasis added.
In this case the **equipment was the Heating/Ventilation/Air Conditioning (HVAC) system. Seven months to correct** the problem of sewer gas entering the system is incredicilous. Gill failed to even attempt to adequately address this problem until **Filoso filed her Accident Report**. Gill repeatedly failed to call in proper

experts in a **timely manner** to correct the problem which had another source in addition to dried up drains. Tab 47.

Gill engaged in a game of semantics when Gill stated "no one approached **me** on that in relation to irritation from sewer gas, other than odor. This directly contradicts information that if you can smell it you're already at the limits, which will cause symptoms. Tab 4. **Gill's statement is contradicted by the conversation that Filoso had with the school nurse. Tab 32 and the subsequent e-mail she sent out about a program on air quality in schools given to her by a considered parent**. Tab 32

Gill in May 2001 also received a letter from VOSHA about the sewer gas and the need to take **immediate corrective action**. Gill and PWCS cannot claim ignorance of health effects after such a letter.Tab 48. **Adequately addressing the sewer gas issue was not only an issue for Filoso's disability but one required by law**. Virginia Code.

Filoso's absences in April, May and June directly correlated to her exposures to sewer gas in April and May 2001.

Filoso was entitled to Worker's Comp. as well as FMLA during this time period. Filoso was also entitled to a leave of absence due to her disability under the ADA. Filoso' doctor removed her from the building until Defendant could correct the sewer gas problem. EEOC Accommodation and Undue Hardship question #19.

When PWCS **failed to fill** a First Accident Report as required by Virginia Code Filoso herself filed the accident report. **Tab 49 Gill is aware of this Accident Report and knew that Filoso was entitled to time off from work due to her accident/injury as allowed by Virginia Code** when

an employee experiences accident or injury. Gill as her principal had signed off on the report.

An attempt was made to **discourage** Filoso from opening the window in her room. Tab 17. This despite the fact that this was the reason that Filoso had been reassigned to this room in Sept. 2000. **Gill stated he had knowledge that various teachers in several of your classrooms would open the window to kind of relieve the smell**. Tab 50(245) This also despite the fact that a **toxic gas** is entering Filoso's room via the school's HVAC system and Filoso was **asking for corrective measures to be taken to stop it.** Filoso when left with no other choice but to **again asked to be disconnected** from HVAC for a second time due to gas and this time was given answer-No. Tab 17. EEOC Reasonable Accommodation and Undue Hardship Appendix #108

Giles v United Air Lines, 95 F. 3d . Jackson v Sweet ideas, ltd.partnership

Filoso's attendance was not an issue with PWCS until after repeated exposures to sewer gas in her workspace. Evidence of this is **Filoso's effective evaluation for the 2000-2001 school year that indicated complete satisfaction with Filoso's job performance.** The evaluation is signed off on **May 1, 2001 after** Fitzgerald's letter on April 26th 2001.School officials were completely aware of Filoso's illness from the sewer gas when evaluation was completed.

The Court made significant comments at the summary judgement decision about lab setting and it being a math room. Tab 1 p.10-Filoso specifically addressed labs in her affidavit. Filoso's students did as many or more labs then any other earth science student in the building. Filoso's students scored higher on VA. SOL tests than Forest Park average.Tab 40. The reason Filoso had flat topped desks put in that room was **so that her students could do labs**. **Filoso**

is NEVER asked during the entire 2000-2001 school year to move back into the science room as 1. Gill is aware of sewer gas problem in the building, 2. Filoso's students are doing labs 3. Observations and evaluations made by Filoso's supervisor Carolyn Custard are completely satisfactory. Gill **never monitored** Filoso to find out if room with a window was effective. It was Filoso, herself who kept reporting air quality issues and receiving either No for an answer or no answer at all.

The court stated Filoso could not be accommodated because simply wasn't coming to work.

Filoso 2001-2002 school year

Filoso disagrees. For the 2001-2002 school year Filoso was placed at Forest Park with no accommodations other than her own charcoal air filter. Filoso was placed back in a room that never worked the previous year because it is a **standard classroom as Fitzgerald demanded** she teach in in his April 26th letter. The room had no window that opened or separate HVAC. Defendants knew this. **Defendant is already on record stating that a room with a window didn't work the year before at Forest Park. Although the statement is not accurate prior to April's sewer gas problem, it does not make sense then for Defendant to believe that a room without a window would be an effective accommodation in it's place**.

The court was in error when it stated that Filoso simply wasn't coming to work. Tab 1 p.20.

Filoso disagrees. Despite this nonaccommodation Filoso made a "good faith" effort to make this room work while continuing to ask for proper accommodation. Filoso brought in her own charcoal filter and even purchased a charcoal filter for the ceiling unit.

This was still inadequate and Filoso got ill each day and had to leave early.

Filoso did come to work each day except for 3 days during this time period. Provided all the lesson plans, tests, grading etc. necessary.

Defendant simply hadn't provided accommodations that would have allowed Filoso to work a full day.

Under the ADA leave of absence is a reasonable accommodation. Filoso was on a leave of absence in May/June of 2001 due to the defendant failing to provide Filoso a Safe and healthy work environment as required by Va. Code . In addition Defendant violated their own policy/reg. **561.02-1 #10. Employees will not be expected to work in hazardous conditions for themselves or their students. Fitzgerald's letter of April 26, 2001 demanded just** this. Tab 10

He later stated at the fact finding hearing that he had no knowledge of the sewer gas issue or chemical exposures at Brentsville the year before at the time the letter was written about Filoso's attendance and accommodation requests. He also stated that he had no knowledge of the letters from Filoso's doctor on April 2000 and April 2001. Tab 51 p.108 **Fitzgerald's statements are not true**. He specifically mentioned the two letters from Filoso's doctors in his April 26th letter. Tab 10 and was sent and e-mail from Principal Mulgrew in May about Filoso's absences from construction materials and asking for guidance on it being a disability and 504 issue. Tab 6.

Fitzgerald had full knowledge of Filoso's doctors and hers requests for accommodation prior to the letter being written. They specifically state what is causing Filoso's breathing problems. When questioned about the letter

Fitzgerald also states that he doesn't see the word disability in the letters. Tab 52 p.111. Something as 504 Compliance Officer he would know. EEOC Guidance ques.#1 employee may use plain English, doesn't have to use ADA or "reasonable accommodation."

Filoso was told in this April 26th letter not to make additional accommodation requests. **Filoso in asking to be disconnected from the HVAC not only considered her health but also the health of her students in her room by such a request.**

Filoso's **absences were completely predictable** as they occurred when Gill **failed to correct the problem of sewer gas in her workspace**. Filoso had begun asking for this problem to be solved in Oct. 2000 and it was the factor in April/May that caused Filoso's doctor to remove her from the building until problem could be corrected.Tab 43.

Filoso's attendance was never an issue when hazardous/toxic substances were kept out of her work environment. Emphasis added
U.S.C. 12113(a)

Gill at Fact Finding Hearing stated that Filoso was terminated for her unprofessional conduct of excessive absences. Filoso's absences clearly fall under worker's comp. claim in April 2000, and April 2001 as such are protected from discipline actions because of **Virginia Code 40.1027.1, FMLA 29 C.F.R. 825.602 (a)(b) for instructional employees, as well as the ADA**. Filoso's **absences for fall 2001 are clearly a direct result of nonaccommodation for Filoso.**

The text of the ADA authorizes discharges for misconduct or inadequate performances that may be caused by a

"disability" in only one category of cases-alcoholism and illegal drug use.

42 U.S.C. & 12114(c)(4).

Humphrey v Memorial Hospital **FN18 (8)(9)**

Filoso comes to school and gets ill as a result of nonaccommodation in 2001-2002. Holding Filoso accountable for missed time due to illness from nonaccommodation in her actual work space once she is there equates to terminating Filoso directly for her disability. Emphasis added.

Filoso was not given reasonable accommodation when defendant placed Filoso on administrative leave and proceeded to terminate based on Filoso's attendance when she is not accommodated in her work environment.

When you take away any absences of Filoso's when she was properly accommodated by keeping irritants/toxic substances out of her environment on the job there is no attendance issue. Such gases do not belong in a school environment in the first place.

Despears v Milwaulkee County,63 F. 3d 635 (7th Cir. 1995).

Issue #2 On Appeal

2. Whether Filoso has presented evidence for a prima facie case for retaliation. Filoso asks the Court to vacate summary judgement for Appelle and remand for trial.

II. Retaliation

Filoso asks the court to consider direct and circumstantial evidence to prove retaliatory animus.

Shaner v Synthes, 204 F.3d 494, 501(3rd Cir. 2000) 42 U.S.C. & 12203(a) (2002), retailation claims under the ADA are analyzed under the same framework as Title VII discrimination claims.

Filoso also asks the court to consider direct evidence and mixed motive. Desert Palace, Inc. v. Costa, No.02-679 (June 2003) U.S. Supreme Court, Fabela v Socorro Independent School District, No. 02-50138, (Fifth Circuit Appeals 2003)

II. To establish a prima facie case for retaliation it is necessary to prove the following:

1. That individual engaged in protected activity.
2. That employer took adverse action against him
3. Causal retaliationship between protected activity and adverse employment action. Haulbrook v Michelin N. Am (00-1546) 4th circuit

Due to the nature of the events and actions Filoso will provide the necessary information in the following format:

A. Will be the protected activity
B Will be the adverse action
C. Will be the causal relationship between protected activity and adverse employment action.

1.A. Filoso asked for numerous accommodations in April 2000. They included switching to another room, asking to be allowed to teach outside, for Adminstration to take necessary steps to prevent exposures. Filoso asked to be placed on administrative leave to get her out of the building when there was no safe place in the building due to the expansive project. Tab 5.

Filoso asked to be transferred to another building for duration of school year. Denied at first. After Filoso became so sick that it took very little exposure to anything to cause illness during that time period Filoso is placed at Godwin and becomes ill the first day as she had before in the moldy trailer. Filoso is only observing that day and is not paid by PWCS. Filoso does not go back based on her experience of

having to go to the ER when the same thing happened at Brentsville. Filoso sought medical treatment as her blood pressure was a problem as it had been in the moldy trailer. Godwin's classroom did not have a window.

1.B. In 1998-2000 PWCS knowingly continued to expose building occupants including Filoso to construction/renovation materials during school hours at Brentsville High School. **In April 2000 The Prince William County Health department was called in** by the school nurse because of employees complaining of adverse reactions including Filoso to such materials. Tab 2

Filoso asks for accommodations due to her illness at Brentsville. **Due to failure of PWCS to act in a timely fashion to exposure complaints and to take necessary steps to ensure the safety of building occupants** Filoso becomes ill. Tab 2 shows the continued requests of Prince William County Health Dept. throughout the month of April.

Filoso's disability of breathing difficulty, rash and headache develops due to chemical/gas exposures at Brentsville.
Principal Mulgrew nor PWCS file a First Accident Report on Filoso as required by Virginia Code 40.1-51.1. Filoso is never told to file worker's compensation claim as a result.

1.C. Filoso is involuntarily transfered in June 2000 after Filoso asks to be accommodated due to illness from chemical exposures.
Filoso was involuntarily transferred from Brentsville H.S. Filoso objected and was transferred anyway.
Construction/renovation was due to be completed prior to teachers returning for the 2000-2001 school year. As such Filoso would not have been exposed to renovation materials

at Brentsville. Filoso also would have had a wall full of windows and a separate HVAC system in that building. Filoso was told by her principal **"she couldn't be trusted not to get sick in the building."** Filoso reported this comment at Personnel to Renee Campbell. Her response was I hope he phrased it differently. To which Filoso responded "No he didn't." Tab 44 p.154. Filoso is transferred anyway to Forest Park.

Filoso's absences due to illness/disability due to continued exposures that year is **sited in Fitzgerald's** April 26th letter of reprimand. Tab 10

Issue # 2 of Retaliation

2.A. At Forest Park H.S. for the 2000-2001 school year the school had just finessed waxing all the hallway floors over weekends preceding employees returning to the building. The floor wax caused such breathing difficulties with Filoso that she asked to switch rooms to a room with a window. Filoso was allowed to switch rooms. The building experienced toxic sewer gas beginning in October 2000. **Filoso reported the smell and illness and when gas still an issue asked to be disconnected from the HVAC system as the gas smell was circulated through the system.** Defendant's response was "**we have gone overboard in accommodating this lady** " and they **never** responded to Filoso. Tab 54

Filoso notified her administrator Carolyn Custard of bus exhaust coming into the school building in cold months of Jan/Feb. 2001**. Schools response was there was nothing they could do about it despite reasonable suggestions from Filoso.**

Court stated it would be unreasonable to reroute buses etc. Tab 1 p.22. However, the common sense things such as shutting off engines when loading and unloading. Not to

have buses idling near the school. To close doors and not leave them propped open, all of which Gill **failed to do, these are things are now required by LAW in California.** There is no evidence that PWCS ever investigated the air quality to access containmentation levels from the bus exhaust. April 17,2001 the **second floor** of the building where **Filoso's room is located** experiences **major sewer gas odors**. Filoso notifies dept. chair, building engineer, administrators, principals that sewer gas is making her sick and causing such health problems that she has to go home. Tabs 55,39. In addition each time Filoso has to leave the building she has to notify AP Custard of her illness and needing to leave.

EEOC Guidance ques.# 14 tells "employees to notify employers of work place barriers that is preventing employee of doing job". Filoso does this numerous times in regards to sewer gas. SEE ACCOMMODATION SECTION **prior** to April 26th letter.
When defendant **fails to correct** the problem by **April 25th** Filoso asks again to be disconnected from the HVAC system. Defendant responds on April 30th NO. Tab 17,

2.B. Defendant for the second year, 2000-2001 has "**materially changed**" the conditions of Filoso's employment. Tab 54,55 **"Increased exposure to pathogens could adversely affect conditions or benefits of employment. Allen V Rumsfield, No. AW-01-2501, U.S. District Court for District of Maryland, 2003. ..."exposed her to dangerous pathogens and subjecting her to less appealing working conditions." Von Gunten V Maryland, No. 00-1058,(4th Cir. Appeals, 2001)**
Defendants own documents of Air Quality report, letter to VOSHA, and Gill testimony all state that sewer gas in Filoso's work place beginning in Oct and continuing throughout the winter and spring and particularly April.

2.C. Filoso received **April 26th letter Tab 10 after** asking for additional accommodation due to sewer gas in her workspace. Letter specifically mentions requests to be disconnected from HVAC. Fitzgerald also cites Filoso not be in a standard lab classroom. **No one from PWCS ever talked with Filoso to find out the types of labs that her students were doing or to find out if there were any barriers that prevented her from fulfilling her job as an Earth science teacher**. Fitzgerald then proceeds to make unsubstantiated statements about her student's lab experiences. Circumstances of the letter and contradictions have already been discussed in accommodation section.

Filoso clearly **engaged in protective activity under the Opposition Clause prior** to the April 26th letter. EEOC Compliance Manual on Retaliation B.2, B.3b.

Fitzgerald responded to Filoso's accommodation request in April as it being "incredulous". Tab 10.This response is clearly a **reprimand** for Filoso requesting a reasonable accommodation under the circumstances.
Filoso is being **reprimanded** and told not to make additional requests. Tab 10. EEOC Compliance Manual D.1. She is also told to seek medical attention so that she can work in their **"standard workplace."** Again indicating their **unwillingness** to make any accommodations. In the case of Forest Park their "standard workplace" means the ability to work in an **environment with toxic sewer gas**.
Filoso suffers another **adverse employment by Defendant exposing her and not informing her she is being exposed to sewer gas and insisting that she work in such an environment**. Filoso is reprimanded in the April 26th letter. The **letter, which directly states she has asked for accommodations and refers to her doctor** letters which indicate the need for accommodations. Letter specifically **scolds** Filoso for **taking sick leave due to illness from the exposures**. **Letter is placed in her personnel file and then**

referred to in Gill's Sept. 18,2001 letter, Tab 78 and used as evidence to terminate Filoso. This despite the fact that Filoso and Caudill **meet** with Fitzgerald on May 10th and **completely fill him in on circumstances of absences and their relationship to sewer gas and the fact that Filoso has a disability**.

Filoso had also filed a First Accident Report under the Code of Virginia because of accident/injury due to toxic sewer gas exposures especially during the month of April 2001.Tab 55 PWCS once again did not file it. Filoso has to.

It is clear that Fitzgerald is trying to **conceal** his knowledge of the **protective activity** of asking for accommodations when he is questioned about the April 26th letter at the fact-finding hearing. **Fitzgerald tries to backpedal and state that he is just acting on the attendance issue and has no knowledge of any other issues**. Tab 56 p. 112, 150. Gill at Forest Park had **direct knowledge** of Filoso's getting ill and missing work due to sewer gas as Filoso had properly notified her administrator on numerous occasions of this prior to the April 26th letter. **Attempts to conceal the fact that the protected action was known at the time of the adverse action. Fitzgerald had received an e-mail for Principal Mulgrew that directly asked for guidance due to Filoso being ill from construction. Tab 6. Can support an inference of a retaliatory motive.** Schlei and P. Grossman, Employment Discrimination Law, 558-559 (2d Ed. 1983).

Third Issue of Retaliation

3.A. Filoso asks to be allowed to teach in a room with a window for the following year in March/April 2001. Tab 18 **No answer is given Filoso in either granting or denying that requests**. Due to the severe breathing difficulties, rash and headaches that Filoso suffered from the sewer gas in

April/May Filoso and her doctor make a additional requests in addition to the window. Tab 27. Filoso and Caudill meet with Fitzgerald in May and early July. Filoso provides the requested documentation to Fitzgerald as to her disability and accommodation requests.

3.B. PWCS while Filoso was **out on leave without pay was working behind the scenes.** There is an e-mail where Becky Irvin is already trying to figure out how to **defend against the worker's comp. claim** for the sewer gas. Tab 57. Gill and PWCS is also investigating to find out who made the VOSHA complaint. Filoso had made a confidential complaint to VOSHA about the toxic sewer gas in April 2001. **Defendant despite being told not to do so made inquires and wrote Filoso's name across the top of the letter from VOSHA and faxed it from Forest Park to personnel.Tab 2. Gill at the Fact Finding Hearing states he didn't try to find out who complained to VOSHA yet Fitzgerald is e-mailing about needing to work with the teacher who made the complaint.** Tab 58.

Aug 2001

"Document everything.""Get her in for "the" planning conference," the second day of work. Not, you need to discuss these issues with Filoso to find out what accommodations she needs, how can we help her, or what is causing a problem but **"get her in for the planning conference and get her started on an action plan". Tab 60. This comment is made the second day back at work when Filoso hasn't missed any time.**

Kept **secret records** Tab 46. e-mails on me **in my personnel** file. Supervised me more than any other employee. Kept daily running log on me. Tab 61. EEOC higher level of scrutiny.

Waited until I returned from summer vacation to assign me to an impossible situation and then document my every move. Wells v. Colorado Dept. of Transportation., ___F.3d ___, 2003 Wl 1901278 (10th Cir. 2003). Id. Richardson v. New York State Dept. of Correctional Service , 180 F.3d 426, (2nd Cir. 1999)

Filoso was on unpaid leave a month and a half and then summer vacation for a period of almost 4 months. It was **when Filoso returned to work that she found that PWCS had began retaliating for a third time against her**. First Gill assigned her to a room with no window. Tab 62. **This took away the window accommodation she had been** allowed the year before. Second they did not provide her with a separate HVAC system since it would be an inside room. By assigning her to such a room she is unable to do her job. **The room without a window had never worked the year before. Filoso had that room the year before and had to ask to be assigned to a room with a window. Defendant had full knowledge of that and reassigned her back there anyway. If that room had been an effective accommodation Filoso wouldn't have had to ask to be moved**. Emphasis added.

"transferring an employee into a job that the company knew she could not perform after the employee registered complaint for sexual harassment may constitute illegal retaliatory conduct even though there was no reduction in her pay or benefits." Dilem v Goodwill Industries of MidEastern Pennsylvania,(3rd Cir. Appeals)

Fitzgerald stated that he had knowledge that the room Filoso was being assigned to had no window. Third they used the same floor wax that had made her sick the Aug. prior in 2000. Tab 62 Fourth Gill and Fitzgerald **refused to give Filoso or PWEA an official answer to repeated request for a room with a window until Oct.5th, six weeks after school started,** defendant would never directly

answer the question. This despite Defendants statement that they would comply with accommodations in last doctor letter. Tab 12.

Failure to take immediate action to adverse conditions. Allen v Rumsfield, No.AW-01-2501.

No other employee is so closely supervised. Mead v U.S. Fidelity & Guaranty Co. 18 FEP Cases 140, 154 (D. Minn. 1977) Defendant on Filoso's second day back states get her started on "the" planning conference when Filoso **cannot attend a meeting due to no accommodation in that room**. Not an action plan but "the" conference. No discussion of alternatives or trying to get input from Filoso on finding a solution.

Gill waited until Filoso returned from leave to start documenting her daily actions.

This violated PWCS own policy of notifying employee when documents were being placed in her personnel file. Defendant had been doing this without her knowledge since year before in Sept. 2000.

Principal Gill, Personnel Director and 504 Compliance Officer Fitzgerald and Secondary Personnel Director Renee Campbell all engage in running internal e-mail dialogue. These are the individuals who are Filoso's supervisor and decision-makers in Personnel issues. The remarks they make are **derision in nature towards Filoso's disability and her continued requests for accommodation.** These remarks will be shown in the timeline and context in which they are being made. **No where in any of the documents is there "guidance" given by Fitzgerald as the 504 Compliance Officer**. He joins in the remarking making and repeating of statements as one of the "boys".

5-2001 Filoso compared to "**Bubble Boy**" Tab 63 p,414
8-17Rick didn't make any such promises,"**Let the games begin**"Tab 64

8-18 School will comply with last Dr. letter except for HVAC and that is pending Tab 12

8-18 Work at home as no accommodations made-ready to call EEOC,Justice Dept. Tab 65

8-26 Fitzgerald writes deceptive letter to Filoso's doctor to Dr. Smith Tab 66

8-27 Gill to Gill discussion with Filoso Tab 67

8-27 Gill to Fitzgerald,Report getting sick, went to classroom-"**see how long that last" Tab 68**

8-27 "**Oh yea"! "We have decided to name the Book Filoso's Follies, she likes the alliteration" "Get her in for "the" planning conference.**Tab 60

8-28 Filoso will start pursuing Fed. And State recourse Tab 70

8-29 Authorization from PWEA for Filoso to meet with attorney Tab 69

9-5 "Land of Mystery Fumes". Tab 73

9-7 Filoso tells Gill she is meeting with PWEA and their attorney about the situation that it's not fair to anyone. Filoso made request of Gill for a window, comment "**he didn't think it would work" Tab 74**

9-10 Filoso speaks to Gill about meeting with attorney and PWEA making one more request on her behalf for a window. Tab

9-10"**PWEA will do anything to appease their members" Tab 75**

9-13 Doctor Smith writes a letter indicating necessity of a room with a window and discusses cleaning products again Tab 72

9-17 memo about open house **and not to mention "POOR VENTILATION"** Tab 77

9-19 Filoso receives letters about attendance and **"bona fide illness".** Tab 78

Gill states he was aware of Filoso's doctor's Sept. 13 letter stating accommodations needed include a window again when he wrote this letter. Tab 56 p. 275.

9-21 Begins informal notification of grievance in response to Sept. 18 letter. Tab 79
9-25 Second grievance notification for nonaccommodation. Tab 80
9-25 **about PWEA making a plea for a switch..."Doing two-step"ready to pull the plug on her"** Tab 81
9-27 **convince her that she should not stay and absence will be reflected on her evaluation...another nail in her coffin Tab 82**
9-27 **doctor's note had ventilated area checked a new look** Tab 83
10-5 Filoso **reports gas smell** in building Tab34
10-5 **Filoso officially told No to room with a window. Tab 19 This 3 hours after Filoso is telling them about sewer gas in building FOR SECOND YEAR. Tab 34
10-10 Notice of grievance for not providing an accommodations. Tab 83
10-16 Grievance filed Tab 84
10-17 Placed on Administrative leave.
10-31 Gill now states for first time us that Filoso does not have a disability, (six months after Filoso specifically used that word). Tab 86

Gill was clearly on notice that Filoso was seeking legal advice and would in all probably be filing grievances if she is not given an answer to the accommodation request or accommodations. It would have been **premature** to file grievance until we got an official response to our request on Sept.10th. Once Gill sent the Sept. 18th letter a grievance was immediately filed. **Gill never did reply to request until Oct. 5th.** Again several weeks after request made. **Gill's reply to Grievance letter on Oct. 16 is on Oct. 31st for the first time that Filoso has no disability.**
Gill in his reply Tab 86 states he doesn't give Filoso a window because she had one the year before and her attendance was still unacceptable. The room with a window did work until April 17th when the room and the rest of the

second floor experienced major sewer gas problems. Sewer gas is toxic and by law must be kept out of an employees workplace. Tab 3. The sewer gas caused significant breathing difficulties, rashes and headaches in Filoso which correlate with her disability. **By using Filoso's absences in response to toxic sewer gas causing her breathing difficulties, Gill is using her disability and worker's compensation claim as a justification not to provide her with an accommodation for the 2001-2002 school year**. Gill is retaliating against Filoso because he knows sewer gas is in the building again for the second year and will probably be an issue and is trying to get rid of her by not providing any accommodations that will allow her to job.

Filoso is in the best position to know of factors in her workplace environment that are causing her difficulty with her disability. Defendant never sends Filoso a copy of any correspondence with her doctor. Defendant never asks for any input from Filoso concerning room assignment, or building assignment. Gill and Fitzgerald completely ignore Filoso's requests or attempts to communicate issues and instead ridicule and mock as evident by preceding timeline.

Shirley v. Chrysler First, Inc. 970, F.2d 39,42 (5th cir. 1992) Here again the fact that the staff is now ignoring Jane Doe or, in the case of one supervisor, treating her with hostility to demonstrates retaliation. Kells v Sinclair Buick-GMC Truck, Inc., No. 99-2795, (Eight Circuit of Appeals, 2000

Fourth Issue of Retaliation

4.A. Aug-Sept 2001 Filoso had **continued to ask** for a room with a window and for hers and her doctor's accommodation requests to be met. Caudill is also asking for accommodations on Filoso's behalf.

4.B. Prior to letter date Sept. 18th about attendance, Filoso is denied the requested accommodations for the 2001-2002 school year. Tab 15.

4.C. Filoso receives Gill's Sept. 18,2001 letter stating that if she misses one more day without a doctor's note she will be recommended for termination. Filoso complies with doctor notes with work restricted box clearly checked additional ventilation in addition Filoso had brought in another letter from her doctor dated Sept.13 clearly stated the need for a window once again. Filoso is placed on administrative leave anyway pending termination proceedings. Tab 78. Gill states in Sept. 18th letter that he wrote April 26th letter. Tab 10. This is completely inaccurate as Fitzgerald wrote the letter.

5. Filoso is terminated on July 25, 2002.

As in Kells v Sinclair Buick-GMC Truck, Inc. No. 94-2795 (8th Cir. Appeals, 2000)
"If it is accepted that the PWCS and its employees conducted itself with a disregard for its obligations to Filoso under federal disability laws, this is relevant evidence of the Defendant's attitude towards Filoso's disability."
A reasonable jury could find that defendant viewed with **derision** Filoso's request for reasonable accommodation and from that infer that Defendant's reason for transferring and discharging Filoso were also related to contempt towards her disability. Failing to provide a Filoso with reasonable accommodations can tend to prove that the PWCS also acted adversely against the Filoso because of her disability.
Viewed in the light most favorable to Filoso, it can be summarized as follows: insensitive comments by supervisors, repeated denials of reasonable accommodations requests, failure to communicate with Filoso, failure to consider with Filoso alternative positions, contradictory statements made by supervisors,

attempts at concealment, and inferences that information has been manufactured post-hoc to support a non-discriminatory explanation for Filoso's termination. Gill and Fitzgerald used a waiting game in the Fall of 2001 in the hopes that Filoso would just get so sick that she would have to go out on leave. When Filoso instead kept showing up each day and asking for the accommodations that told her they would make they waited until there was enough partial days of work that they could try and use against her to justify their wanting to get rid of her because of her disability.

The Court stated that ...the plaintiff was on notice from April 26, 2001, which is several months before she filed her formal complaint about a potential ADA violation, that her absenteeism was unacceptable and had to be corrected, and then on September 18, 2001, so several months later, there's a second letter, and that predates again her complaint. It references the April 26 **causally connected together.**

Requests for Oral Argument

Filoso would request oral arguments for this case. As you can see it is fact intensive and also has a number of laws and cases that support Filoso's position. Filoso is in the best position to adequately address any questions of fact of law that apply to her case. From the limited access to research as a pro se individual that I have been able to do, it appears that the Fourth Circuit of Appeals has never really addressed an employers duty in the interactive process, it has addressed an employee's in Haulbrook v Michelin N American (No.-00-1546). It also has not addressed attendance issues that are a result of the employers failure to provide a safe and healthy work environment which lead to termination. The case of Allen v Rumsfeld, No. AW-01-2501, U.S. District Court of Maryland 2003 and Von Gunten v Maryland, (No. 00-1058,

(4th Cir. Appeals, 2001) although they cited material conditions and exposure to dangerous pathogens they did not decide the case on these issues. For these reasons I believe oral argument is a reasonable request.

APPENDIX D

In The
United States Court of Appeals
For the Fourth Circuit

Record No. 03-1943

Phyllis Filoso **Appellant. (Pro Se)**

V

Prince William County School Board
Appellee

Response to Appellee Brief

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Filoso (Appellant)contends that the Court erred when it granted summary judgment to Prince William County School Board(PWCS) Appellee. Filoso also states that there are numerous points of law under the ADA and 504 Rehabilitation Act as well as court case precedent that indicates that summary judgement was inappropiate and should not have been granted.

Filoso does not state that she has a disability based on IEI or MCS. Filoso states that she has a disability based on her breathing difficulties when exposed to a wide variety of chemicals. The chemicals are typically found in places of work, stores, churches, homes. Filoso even when not exposed continues to suffer from the effects of exposures in the form of extreme fatigue and "flu like" achiness. These are markedly increased with exposures for several days following such exposures. Filoso also has rashes, headaches, and difficultly concentrating with exposures.

Filoso points out that although she does not claim IEI or MCS as her disability that under the ADA the name of the disability is irrelevant. It is the effect it has on the individual's major life functions that must be considered on a case by case basis under the ADA. In Filoso's case her disability of breathing difficulties affects her ability breathe, work, do basic household cleaning/maintence, shop, attend church, and participate in most normal social activities.

Also noted is that Filoso would have prevailed at summary judgement on Daubert issue as Dr. Smith is and has been Filoso's treating physician for over seven years.

Issue 1 in response to PWCS brief.

PWCS does not state the facts concerning Filoso's attendance correctly. PWCS continues to state that "Filoso's absences cluster around weekends and holidays". **The attendance chart that PWCS has provided does not bear this out. Filoso's rigorously objects to the grossly mischaracterization of attendance. Filoso's absences directly correspond to significant exposure to hazardous and toxic gases from renovation in her school building at Brentsville 2000 and toxic sewer gas at Forest Park in 2000-2001**. There is no correlation to "clustering around long weekends and holidays. PWCS uses every Fri. and Mon. when Filoso is out altogether for injury/accident to calculate so called "statistics".

PWCS does not deny she was exposed to these substances. PWCS also admits that these exposures occurred over long periods of time with **significant exposure occurring in the month of April/May in 2000 and 2001 respectively.** Von Gunten v Maryland, (No. 00-1058, (4th Cir. Appeals 2001), Allen v Rumsfeld, (No. AW-01-2501, U.S. District Court of Maryland.
This is also born out in the letters from the Prince William Health Department in April 2000, Virginia OSHA inspections and from PWCS own air quality report done in May and June 2001.

Accommodations At Brentsville High School (1999-2000)
PWCS does not deny that renovation work was conducted during the school day while Filoso was there. Virginia OSHA collected a number of MSDS that show toxic and hazardous products in use. PWCS does not deny that these products were in use during the school day. Prince William Health Department(PWHD) was called by the school nurse(their employee) because of numerous complaints of illness due to renovation work. PWCS does not deny that

they did no testing or investigation of these complaints. These products are known respiratory irritants.

Filoso agrees that she was moved within the building several times by PWCS. **What PWCS doesn't state to the court is that the issues of chemical exposures and dust continued because (1) PWCS failed to follow established industry standard of good practice to prevent occupants from such exposures and (2) even when informed by other employees as well as Filoso of illness from such, PWCS failed to adequately follow Prince William County Health Department (PWHD) or Virginia OSHA's recommendations to reduce such exposures.** As evidenced by inadequacies noted on repeat inspections by PWHD. Keeping Filoso in such an environment was completely ineffective. When Filoso asked about being placed in one of the trailers at the school to remove her from the building **she had no idea that the trailer was so infected with mold that she would have to be rushed to the emergency room by rescue squad**. The Health Department inspected the **trailer the following day and told PWCS to clean it up**! PWEA admitted such mold to the EEOC in their response and plaintiffs exhibit 14 shows the **trailer had to be shut down due to the high mold content**. PWCS **refused** to place Filoso on Administrative leave to get her out of the building and away from such materials and **instead insisted** that she keep trying different parts of the building. PWCS knowingly violated 29 CFR 1910.1200 to include (h)(3) (1)-(iv), also OSHA's General Duty Clause.

It is obscene for PWCS to try and state that the particular substance couldn't be identified as they were the ones using the products in the different parts of the building and failed to investigate the name of the particular brand of paint, tile adhesive etc. They also failed to give Filoso MSDS sheets so that her doctors would have complete knowledge of all ingredients in such products. **Filoso points out that this is**

not a toxic tort or causation case of products before this court.

PWCS also does not deny that they failed to file a First Accident Report as required by Virginia Code despite Filoso's reporting of illness from such exposures and ER visit. ER report objective findings indicates wheezing and high blood pressure from mold exposure.

Filoso was never offered a transfer. Filoso was told in June 2000 that she was being transferred because "she couldn't be trusted not to get sick in the building". Filoso **objected** to such a transfer being unnecessary, as all renovation would have been completed prior to the new school year. She would have had a room with windows, separate air system had she been permitted to remain at Brentsville. Because PWCS force transferred Filoso she ended up in a new building that had **chronic toxic sewer gas. Transferring an employee who has asked for accommodations and reported health and safety violations to employer is retaliation. Such retaliation caused Filoso to be subjected to dangerous toxic sewer gas in the new building.**

Filoso at Forest Park High School (2000-2001)
Filoso was allowed to move to a room with a window in Sept. 2000 after experiencing significant breathing difficulties following the school's application of floor wax immediately preceding her return to work for the 2000-2001 school year. PWCS does not deny that they applied the wax over 2 consecutive weekends.

In Oct. 2000 **PWCS fails to do the proper maintenance on the HVAC system that would prevent sewer gas from entering the system. The very fact that Filoso has to even make such a request requesting disconnect shows PWCS was not maintaining their equipment properly. PWCS**

does not deny such failure on their behalf. PWCS claims post hoc that this request would have violated building codes yet they fail to respond to the central issue that by allowing toxic sewer gas in their system and failing to correct the problem they are violating both state and federal law. **Key to Filoso's disability is a clean air supply.** Such exposures continued over the next 6 months.
Despite complaints from teachers in all parts of the building beginning in Oct.2000 some **so severe that their classes had to be completely relocated,** PWCS fails to conduct any air quality testing under such conditions and then criticize Filoso for not knowing exposure levels.

PWCS would have this court believe that there was no indoor air quality problem with Forest Park High School. 1. PWCS does it's own in-house testing, 2. **Testing was never done** at the time that Filoso is making her complaints about such, 3. Their own report identifies sewer gas as chronic throughout the heating season (Oct-May), 4. PWCS had already begun corrective action prior to any testing. Despite their own report PWCS states that other than sewer gas- no problem. This statement again tries to underscore the toxicity of sewer gas, which PWCS is fully aware of. **PWCS also does not deny that they once again failed to file a First Accident Report of Filoso and that it is Filoso who insists that such be filed**. PWCS also does not deny that they did no testing at any other time to access levels of bus exhaust or floor wax VOC's in the building yet claim the levels were acceptable.

It is a complete falsehood that any filters were ever placed on the roof top sewer vents in 2001 as they state for the first time. Evidence of this is that school officials **were supposedly unaware that these pipes were improperly spaced when Prince William County Building Department** cited the school system for such in March 2002. **If school officials are now**

stating they knew that the pipes were an issue then they knowingly violated building codes that carried possibly criminal prosecution for such violations. Also lack of any mention of anything other than dried up drains as the problem in every discovery/deposition until the county cited them. Principal Gill is on record as is their air quality report that the only thing they did that year was to pour water down drains and the "only" source identified by PWCS that year was dried up drains. Another example of PWCS trying to manufacture information post hoc and in this cases a false hood.

Also proof of this as being a false hood is the fact that sewer gas is again in the building for the 2001-2002 school year.

It is incredulous that Principal Gill or PWCS upon receiving a letter from Virginia OSHA telling them they had 10 days to correct the sewer gas problem and them admitting that they contacted their own environmental shop can still claim they they had no knowledge that sewer gas was a "health hazard". Even giving PWCS the complete benefit of the doubt that they didn't know it was toxic, this information was clearly presented at Filoso's Fact Finding hearing. **PWCS still had time to correct their actions at that point with such knowledge and make things right and failed to do so.** The ADA recognizes that employers who take appropriate actions when presented with information will not have action taken against them for their efforts to act in good faith. PWCS chose not to do this. Again, evidence that all they were interested in was getting rid of Filoso.

It is also unbelievable that PWCS still states that no substances were identified that caused Filoso's complaints when they admit sewer gas all winter long and particularly in April upstairs and that the school applied the wax at the beginning of the year as Filoso stated. Although Filoso may not have known the brand

name of the floor wax she knew it was floor wax that caused her problem. Filoso in her deposition very clearly articulates how she determined it was floor wax.

Filoso's absences directly correspondent to her exposure to toxic sewer gas in her workspace in April 2001. There is no pattern of Filoso's absences other than them corresponding directly to chemical/gas exposures in her workplace.

PWCS has "materially and adversely changed the work environment to include toxic sewer gas" and then demands Filoso work in such an environment. Ample evidence of sewer gas is in Principal Gill's own testimony and Air Quality Report.

Accommodations at Forest Park (2001-2002)
Principal Gill admits that there were no accommodations given to Filoso for the 2001-2002 school year. Accommodations that would have allowed Filoso to do her job included a room with a window that opened, separate HVAC since school continued to have sewer gas in it's HVAC system that year, and use of a different floor wax. These are the accommodations that would have allowed Filoso to do her job at Forest Park. **None of these were provided.**

PWCS goes out of its way to mention moving a meeting or Filoso not attending a meeting she knew nothing about. **PWCS fails to mention that they never provided a filter of any type for any other room, filters for the schools HVAC system. locating any meeting in a room with a window, nothing** that would allow Filoso to switch to another room. PWCS attempted to isolate Filoso from the rest of the building by their actions.

PWCS even criticizes Filoso for leaving a meeting early on Aug. 27,2001 due to floor wax bothering her. **Principal Gill is on record that the school used no wax for over two weeks yet PWCS now shows in their own documents it was still in use the week of Aug. 27th in their own cleaning schedules.** In particular it shows use in areas directly adjacent to where the meeting is being held. **PWCS told Filoso and the court in depositions and interrogatory completely untrue statements about floor wax usage in the building.**

PWCS with all its access to product manufactures custodial staff at the central office level, an environmental shop fail to even investigate possible alternative waxes/cleaning products, application modifications, or scheduling. Nor does anyone consult with any of the various federal agencies or state that could possibly help for resource. Only post hoc did PWCS state they contacted the source Filoso provided in the summer of 2001 but not until Sept. 2001. It is also pointed out that this was never communicated to Filoso or her doctor and not until summary judgement did this information magically appear and was objected to by Filoso's attorney as being after discovery was closed and after depositions.

PWCS post hoc attempts to state cost and state law requirements as preventing switching of cleaning products. PWCS fails to provide any state law that requires testing of products prior to use in schools. There is no such law. The only requirement is that the products have MSDS sheets for them. The Virginia Procurement Act does not require the same product to be used in every building in PWCS, nor is there a school board policy that requires such. Even if such a policy existed, the ADA requires modification of policy as an accommodation. Filoso never asked that the school be recleaned. Even the mention of such by PWCS is absurd.

Filoso never demanded anything of PWCS. Filoso made requests for accommodations as allowed by the ADA. Several notes, letters, evidence this where she asks. While rerouting the buses may not have been possible, closing doors instead of leaving them propped open for 20-25 minutes every morning and afternoon and turning off engines while unloading are completely reasonable and were DENIED.

It is PWCS that assigned Filoso back to Forest Park and told her they would do accommodations. Which they did not do. **PWCS does not engage in the Interactive Process with Filoso.**

PWCS knew that **Brentsville had a vacancy** at that time that the window is requested. **Brentsville had windows that opened in a science room and thanks to deposition testimony also provided that it had an independent air system**. Renovation work that had been the issue at Brentsville was completed for over a year. Brentsville did not have sewer gas issues, and the equiped earth science room faced the back of the building away from the bus area.

The ADA states that employers may select among "effective" and reasonable accommodations. **It has been clearly shown that PWCS by choosing to keep Filoso had Forest Park completely disregarded both Filoso's and her doctor's requested accommodation of a room with a window and separate HVAC.** Brentsville would have met the requirement of PWCS that she be in a designated science room. It would also have met Filoso's of windows that opened, an independent HVAC system (learned in deposition). The only issue left would have been cleaning products and since Brentsville is a much smaller school any change would have been less costly.

PWCS states in response to the mention of Brentsville and the vacancy "moreover, the school was not required to subject faculty and students to yet another round of Filoso's excessive absences where neither Filoso or her doctor could pinpoint the specific substances and/or level of exposure causing her symptoms and insure that a different school would not produce the same effect." Yet goes on to tell Filoso she should have requested Brentsville when she found out in late August 2001 that her room would not have a window at Forest Park". **PWCS just stated that it wouldn't have mattered what Filoso requested in the way of a transfer, as they weren't going to do it.** This is in violation of the ADA, which clearly states reassignment if accommodation not possible at present position.

Filoso argues that for PWCS even to make such a remark about absences and Brentsville indicates that they REGARDED HER as having a disability likely to cause absences from environmental conditions and they also considered her disability as substantially limiting in environments she is able to tolerate.

While Filoso had knowledge that Brentsville had windows it is not until PWCS is deposed that the separateness of the HVAC is explained. Each room in the science area(older part of the building) draws fresh air from the outside of each room and does not share any common air from other rooms. It uses radiators with hot and cold water running in them to heat and cool the rooms. Fitzgerald supposedly conferred with the maintenance staff, which would have had knowledge of such workings as evident in their deposition. In addition, Filoso and PWEA had been assured by Fitzgerald that accommodations would be made at Forest Park when she was informed that she would be reassigned there. Which they did not do.

PWCS completely ignores Dr. Smith's letters in April 2000, April 2001, and May 2001 that do identify substances that are causing problems for Filoso's disability. More over Filoso has herself told administration and personnel of specifically the floor wax, bus exhaust, sewer gas, renovation products. This is documented in PWCS own documents. It is absurd for them to make such a statement. PWCS never denies the products in use do not contain VOC's as Dr. Smith indicates.

PWCS also states for the first time that they provided Dr. Smith with Material Safety Data Sheets(MSDS) for him to review. This is complete fabrication and an attempt to deceive this court. Never once did they provide Dr. Smith with any information about any product they used or their MSDS as they now state. There is no correspondence asking him to review. There are no enclosures provided in the 2 letters that Fitzgerald wrote Dr. Smith. Filoso herself asks PWCS for MSDS for a number of cleaning products in late Aug. 2001 when she finds out they're using the same floor wax again.

Under the ADA when an accommodation is asked for to allow an employee to do their job unless it is an unreasonable/undue hardship an employer needs to make the accommodation. **PWCS does not dispute the fact that a vacancy existed at Brentsville nor do they dispute that modification to their HVAC system would not have been necessary. They contend that they have a 'magically crystal ball" and could project that attendance would have been an issue again.** That's not the way the ADA works. Removing Filoso from a school that was **doomed to have sewer gas issues** as Principal Gill admitted he had had with other school of same design was not only logical but required when a vacancy existed that did just that and provide her with reasonable accommodations that wouldn't have cost any money to modify the HVAC system.

Under the ADA reassignment is required when there is a vacancy that an employee is qualified for and accommodation is not possible at their present position (according to PWCS).

Filoso would argue that by keeping Filoso in a building with known sewer gas issues, providing no accommodations that have any effect for her breathing disability and not providing her the opportunity to transfer to Brentsville is direct proof of their intent to force Filoso out/retailation. In other words they sat Filoso up to fail. They placed Filoso in an intolerable position.

" A complete failure to act by the employer is not required, an employer may not insulate itself entirely from liability by taking some token action in response to intolerable conditions. The foreseeable consequences of token action by the employer would still be that the employee resigns. In other words the actions taken must be reasonably calculated to end the intolerable working environment. Amirmoki V Baltimore Gas & Electric Co. CA-92-3675-DKC (4th Cir. Appeals 1995)
In Paroline v Unisys Corp, 879 F.2d at 114 "For example intent may be inferred from a failure to act in the face of intolerable conditions."

PWCS by failing to assign Filoso to a vacancy that would have fulfilled accommodation requests about HVAC/window, instead placed Filoso in an inside room with no window, no separate HVAC, no change in cleaning products(in particular the floor wax), providing two filters that are not even the right type(charcoal), making no adjustments any where else in the school so that she can attend meetings/bathroom and exposing her to toxic sewer gas a second year as they knew would happen clearly show that they had every intention of forcing Filoso out. Their

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very own e-mails, "start her on the action plan", "let the games begin", "see how long that lasts", we know she is sick", "another nail in her coffin" betray their intentions also. Most telling is that the Personnel Director, Fitzgerald who would be knowledgeable about vacancy at Brentsville and as 504 Compliance Officer engages in so called "attempt at humor" in e-mails and offers not one shred of advise for the ADA or 504 Act. These actions all place Filoso in such an environment.

Also pointed out to this court is that PWCS never once states to Filoso, Dr.Smith, or PWEA that they don't believe that Filoso has a disability and does so only after they have placed her on administrative leave. Also absence any attempt to contact any other medical professional for advice, Fitzgerald specifically states he didn't though he has in other cases or to request that Filoso see an independent medical examiner and instead uses stereotype information he obtained from the Internet.

PWCS in their very own words make Filoso's case that she has a disability. They state 3 school she had issues with. An individual that is limited in working in a number of jobs is disabled under the meaning of working.

PWCS on page 11 state "she was the only teacher who found the work environment rendered her unable to work". This further proves that Filoso has a disability that when compare to the general population is substantially limited.

ISSUE 2.

PWCS lists several court cases for attendance as essential job function. In reviewing the ones I could access none of them address the issue that because of accident/injury in April

2000, and April 2001 that Filoso was entitled to time off under worker's compensation/FMLA. At no time did Filoso miss close 12 weeks of work in a school year. Under the Code of Virginia it is illegal to terminate and employee that has an accident/injury unless all steps for absenteeism have been taken. PWCS did not do this. PWCS routinely has teachers taking maternity leave for 8 weeks, has teachers out for a month or more for surgeries, cancer treatments, etc. and does not terminate them. These are not individuals that have a disability either.

The cases cited by PWCS do not address the employer failing to make adequate accommodations to allow the employee who has already shown up to work do their job.

In Appellant's brief they state "from Sept 4th to Oct. 16th Filoso worked only seven days, leaving early on most of those.
PWCS does not state the facts correctly. Filoso reported to work all but 3 days during that time period and attempted to do her job each day. She and PWEA on her behalf continued during this time to ask for the accommodations that would allow her to do her job. Because of nonaccommodation Filoso got ill and had to leave early each day. It is also pointed out that as gases from the floor wax subsided Filoso slowly was able to stay longer. **For the 2001-2002 school year Filoso reported to work every day but three days when she was recommend for termination and placed on administrative leave.** Not just seven days as stated to this court. Another attempts to deceive this court with the misinformation. Any juggling of other teachers to cover Filoso's classes was a direct result of PWCS not accommodating Filoso so she could do her job.

The cases PWCS cite are for not coming to work altogether was not the issue in 2001-2002. Nonaccommodation at the actual workplace that allows an employee to do their job is

the issue. The issue the prior year was accident/injury for toxic sewer gas exposure.

The trial court erred when they stated that Filoso couldn't be accommodated because she wasn't coming to work. As has been shown, Filoso did come to work each day and asked for the accommodations that would allow her to work. PWCS attempts to deceive this court by completely misstating the facts. PWCS own documents show the date and time that Filoso left each day and that she clearly showed up and attempted to work each day.

Issue 3

Filoso contends that the Trial Court erred when it stated that there was no causal connection.

Facts

Filoso very clearly in her timeline demonstrated a direct causal relationship to her protected activity of asking for accommodations and PWCS remarks, which were derision, and nonaccommodation for the 2001-2002 school year. Filoso also under the ADA under the opposition clause informed her union/association (PWEA) of the failure of PWCS to engage in the interactive process, nonaccommodation, and her intent to notify state and local agencies of such. This is borne out by PWEA authorizing Filoso to meet with their attorney, Steve Stone. **All of these occurred prior to Gill's Sept. 18th letter. In addition written verification of Filoso's notification to her direct supervisor Carolyn Custard occurred on Aug. 31 specifically protesting the nonaccommodations and use of the same cleaners. Again, prior to any adverse action by PWCS and before Filoso had missed any time that year. Fil 644. Most telling of the causal connection is that a vacancy existed that would meet the accommodation requests and PWCS never admitted such to the court.**

The timeline that Filoso provided to the court in her first brief very clearly show that **she engaged in protected activity of asking for accommodations and opposition clause again prior to any adverse action being taken and that each of these requests were denied.** It also showed that PWCS was clearly on notice that **Filoso was seeking advice of counsel and that one more attempt was being made to obtain accommodations. Filoso clearly put PWCS on notice of impending action prior to the Sept. 18th letter. Filoso also informed her supervisor on Aug. 31 of her objections to nonaccommodations. Fil 644**

This circuit emphasized in Shalala that to "foreclose the possibility of mediation and resolution of the problem without resort to litigation; further, it would reduce the chance that the employment relationship could be salvage. Filoso was giving PWCS every opportunity to comply the ADA and 504 Act despite her getting ill from such nonaccommodations each day. Filoso through her actions of bringing in her own charcoal filter, purchasing a filter for the school's HVAC system, requesting science meetings to be held in her room so that she can attend, and providing daily lessons plans demonstrated that she was doing everything in her power to try and self accommodate and act in good faith, and of requesting proper accommodations prior to adverse actions that would allow her to do her job safely.

PWCS demonstrated in their actions and own words that they did not want Filoso and were trying to document to get rid of her.

A formal grievance or charge is not the only protected activity necessary for protection from retaliation under the ADA as PWCS tries to claim and the trial court erred by stating such. Reporting of such to union or in Filoso's case PWEA constitutes such activity on Aug. 2001 Tab 70,

and on April 19, 2001. Fil 549. Filoso began the informal grievance process immediately upon receiving Gill's Sept. 18th letter on Sept. 21 Tab 79, not just the formal letter that PWEA filed on her behalf on Oct. 10,2001 as PWCS states. **All protected activity under the ADA.**

Issue 4.
Filoso does not claim a disability of IEI or MCS. Filoso states she has a breathing disability in relation to number of chemicals one is exposed to in everyday life.

Dr. Smith never stated that neither he nor anyone else could link Filoso's symptoms to any particular odor, substance, chemical as PWCS claims. It was PWCS that made such a claim to Dr. Smith in their letter to him in July 2001. As a matter of fact Dr. Smith in his deposition directly links his letter in May 2001 not only to Filoso's statement of sewer gas in her workspace but also refers to the schools air quality report that directly admits such in her environment. Dr. Smith's April 2000, April 2001, May 2001, June 2001, August 2001, and Sept. 2001 directly relate exposures in the workplace to already listed substances as causing Filoso's breathing problems.PWCS is knowledgeable of any particular brand name and tries to confuse the issue because they never gave that information to Dr. Smith.

The Fourth Circuit in EEOC v Sara Lee Corp., 237.3d 349, 352 (fourth cir. 2001) defined substantially limits to mean using 29C.F.R. &1630.2 (i)-(ii).

Filoso has shown through her income tax records that her antique business had to be discontinued in Tenn. and any resulting increase in sales were a result of (1) liquidation of merchandise and not replacing merchandise and (2) placing a number of pieces of furniture/possession in the shop of her mother's to sell. Filoso did not materially participate in any of the activities of the shop in Tenn since 2000 and paid the

shop to straighten and tend to any needs in her booths until liquidated.

It is important for the court to understand that with each major exposure that Filoso's condition became increasing worse. The time that Filoso asked for accommodations it was to allow her to do her job but to also prevent further worsening of her condition to the point it is today.

Although some of Filoso's symptoms can be reduced in time by removing herself from the environment and taking medications others such as her breathing takes hours before they it is back to normal. These medications also have known side effects of drowsiness. While Dr. Smith responded to PWCS distortion and untruths about Filoso's room for the 2001-2002 school year with "they appear reasonable" **it was clearly shown that PWCS had intentionally misrepresented the facts to Dr. Smith and when presented the true facts he would not have said such. Evidenced by Smith's testimony at Fact Finding Hearing when asked about the statement.**

Filoso disagrees with PWCS as trying to state that her condition is only temporary. Filoso's condition began in April 2000 and never stopped. It is also clear that when Filoso and Dr. Smith ask for accommodations in April 2001 and June 2001 that it is excepted to continue. Not tempoary as PWCS would have this court believe. As evidence that PWCS knew Filoso continued to have symptoms was their not asking Filoso to move back into the science room the entire 2000-2001 school year.

Filoso disagrees with PWCS contention that their sole source of information was Dr. Smith. Filoso sought treatment from Dr. Ziem in Dec. 2001 as she is a specialist in Occupational Medicine and more familiar with chemical exposures. Filoso final adverse employment action was in

July 2002 when she was formally terminated. At the time that Filoso sought treatment from Dr. Ziem Filoso's Fact Finding Hearing had not occurred and Filoso was on administrative leave. As such she continued to enjoy the benefits of an employee in the form of salary, health insurance,matching annunites,pay in to Va. retirement. The Fact Finding Hearing was the final stage in the grievance procedure. **The whole purpose of the grievance procedure is to allow both sides to talk and to try and work out a solution.** Dr. Ziem presented letters for accommodation request medical information, and testified at the hearing. Dr. Ziem is a treating physician of Filoso's and treated her several months before PWCS final act of adverse action in the form of termination. At the time Dr. Ziem presented information to PWCS about Filoso, Filoso was clearly considered an employee. Filoso had to be available at home or by phone each day while on administrative leave. Also proving they considered her still and employee under their control.

It is again pointed out to this court that at no time did PWCS while Filoso was an employee request her to see an Independent Medical Examiner for a second opinion.

Dr. Smith **NEVER testified that he thought Filoso's condition was not permanent**. As a matter of fact by the time the Fact Finding hearing was held Filoso had the condition for 2 years.
The record does show that school officials did regard Filoso as disabled. Fitzgerald even sent a letter in June 2001 stating as much and to provide documentation from her doctor. It was after Fitzgerald's Internet search that PWCS began to consider it psychological and not necessary to accommodate it despite having stated that they would.
The record also shows that while Filoso may have gotten the sickest at Forest Park from the toxic sewer gas others had

problems also. **Filoso's inability to tolerate conditions others can helps to prove her disability**.

PWCS's claims of skepticism are inexcusable as their excuse for the derision remarks they made about Filoso and her condition. Had they had any doubt they could have had Filoso see a doctor of their choice for additional verification. They did not. Fitzgerald at the Fact Finding Hearing admits that his remarks were an attempt at humor.

Issue 5

Filoso's timeline in the original brief clearly shows that termination was directly a result of her disability.

PWCS claims "Filoso failed to work even when she was given the accommodations that she requested". This is a bold face lie. First and foremost to any request was to keep hazardous/toxic substances out of her work and environment and they did not. Nor did they do any accommodations for the 2001-2002 school year she requested despite the school continuing to have sewer gas issues.

PWCS only accommodation to Filoso or that her doctor had requested for 2001-2002 was to allow her to use her own charcoal filter.

It has been clearly shown that:

1.Filoso acted in good faith by reporting illness/disability and requesting accommodations for such prior to any adverse actions by PWCS.

2. Filoso provided ample information about her disability to PWCS, including seeking medical treatment from a second physician who specializes in chemical exposures.

3. Filoso engaged in protected active of seeking help from her union/association, Prince William Education Association (PWEA).

4. PWCS does not act in good faith. They concealed knowledge of Filoso's exposures/illness. Presented

inaccurate information to Dr. Smith. **Completely refused to consider a transfer to a vacancy Filoso was qualified for**. Make derision remarks about Filoso's disability. Failed to properly maintain HVAC system.
5. That the court erred in either failing to consider all information or in siding with moving party (PWCS) when conflicting information.

Filoso respectfully submits that the trial court erred in granting summary judgement to PWCS.

Certificate of Service

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I certify that on October 14,2003, I mailed a complete copy of this informal response brief to appellee's brief and all attachments to all parties, addressed as shown.

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